Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

JERRY MURPHY
Plaintiff – Appellant

vs.

METROPOLITAN TRANSIT AUTHORITY
Defendant – Appellant

On Petition for a Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
Of The Southern District Of Texas
Houston Division

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Has the Court of Appeals at the Fifth Circuit, in this case set aside the general principal of evidence law, by denying, without comment, a petition for rehearing that was presented on the grounds of evidence submission?

2. Is it proper for the Court of Appeals through its Circuit Judges to assert that: "Summary judgment is proper if … there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." *Young v. Equifax Credit Info. Servs., Inc., 294 F. 3d 631, 635 (5th Cir.2002),* when the Plaintiff has asserted that there is a significant fact issue that the District Court Judge was incorrect about; and whether the non-discriminatory reason for termination found in the Panel's Opinion was one that was not supported by evidence?

3. Is it proper for the District Court Judge of the Southern District of Texas to assert that: "His employer says that it fired him for lying." *Pg. 1 Opinion for Summary Judgment,* when this assertion is a significant fact issue that has repeatedly been denied by the Plaintiff, and evidence has been provided that shows that the Plaintiff was not lying?

4. Is it proper for the Defendant, Metropolitan Transit Authority (*Metro/MTA*), to present 'hearsay evidence in the form of an October 8,

2002 memo written by David McMaster (Director Customer Service and Sales, Metro) where he makes hearsay allegations (*R458)* that Mr. Murphy's (*Plaintiff*) September 2002 document submission and statement meant that a van had been delivered and the vanpool begun operation.', and this be the only evidence used to substantiate to the Court that a lie was told by the Plaintiff?

5. Is it proper for the Court of Appeals' Circuit Judges to state: " In determining if there is a genuine issue of material fact, this court reviews the evidence in the light most favorable to the non-moving party." *Performance Autoplex II Ltd. V. Mid-Continent Casualty Co., 322 F.3d 847, 853 (5th Cir. 2003) [see page 3]*, and then proceeds to overlook the evidence presented by the Plaintiff which shows factual issues in dispute?

6. Is it proper for the Court of Appeals' Circuit Judges to make a declarative statement, as if factual, when it stated: " Every performance evaluation and nearly every correspondence in the record indicates Murphy's deficiency." (*Pg 4*), even though specific evidence in the record, *at Exhibit #10, Plaintiff Jerry Murphy's Response in Opposition to Defendant Metropolitan Transit Authority's Motion for Summary Judgment*, shows to the contrary, of the four 6-month evaluations, each of the first three (03-01-01, 8-02-01, & 2-11-02) had an overall rating of 'Completely Satisfies' standards? In addition, the Plaintiff has repudiated each item of correspondence in

the record as incorrect. (*R. 475-6, Murphy's 9-22-02 Performance Review rebuttal letter*)

7. Is it proper for the Court of Appeals' Circuit Judges to write: "Management finally terminated Murphy after the dissolution of a van pool group that Murphy organized; Murphy failed to provide prompt notice of the dissolution to management purportedly causing cost-and significant inconvenience." *Pgs 4 & 5*, even though evidence was presented, *at Exhibits # 4&5 of Plaintiff's Response to Motion for Summary Judgment*, that showed the van pool group had not dissolved and proper correspondence and communication about the van's correct status was submitted to MTA's management and is found in the Court's record (*R.606, R.608-R.610*)? Additionally, the assertion of 'causing cost and significant inconvenience' is a complete fabrication and is not verifiable or shown in the record.

8. Is it proper for the Court of Appeals' Circuit Judges to state: "Murphy produced no corroborating evidence to support these allegations regarding the dissolution of the vanpool.", even though, *Exhibit #4 of Plaintiff's Response to Motion for Summary Judgment*, provides specific evidence of written correspondence of the van pool group's continued interest in vanpooling as late as October 13, 2002 (*R. 606/Excerpt #18; e-mail from Jacque McKenzie, Supervisor, Reliant Energy, App.*)?

Questions Presented for Review- Continued

9. Is it proper for the Court of Appeals' Circuit Judges to state: "Murphy has produced no evidence that could undermine the poor performance evaluations that he received during his employment at MTA.", when the District Court denied the Plaintiff's Motion to Compel Documents necessary to show inequities in production crediting by Murphy's supervisor (*see docket item # 24*)? However, the Plaintiff did provide at R. 475, his performance review rebuttal letter.

10. Is it proper for the Court of Appeals to overlook a 162-page critical support document (*and Plaintiff's motion request to have the Court of Appeals to include this document in its review*) of the District Court docket item # 35, (*Plaintiff Jerry Murphy Provides 2nd Response to Defendant Metropolitan Transit Authority's Surreply to Defendant's Motion for Summary Judgment*), which was submitted to the District Court on the same date that the Court submitted it decision, March 22, 2004; and whether the Panel's Opinion fails to adequately credit the record evidence that Appellee's reason for termination was false and pretexual?

11. Is it proper that the District Court Judge can use defaming language in its description of performance issues of the Plaintiff (i.e. *"he lied about the existence of a vanpool"*) (*page 3*) when the Plaintiff must restrict his objection because the Defendant is allowed protection against 'defamation claims' by being 'of sovereign immunity' (*see R.520*); and when the District Court as a referee in the

disputes of this case has hampered the Plaintiff's position in defense of his performance by denying his Motion to Compel Documents (docket item # 24), and allowing for the Defense that 'Formal discovery is quashed' (*see Conference Memorandum at docket item # 14*)?

12. Is it proper for the District Court Judge to state that: "Murphy wishes away the paper record that he produced…., and the facts show that Murphy fabricated his work record." (*page 3*) "Metro,…, has substantiated why it fired Murphy: he misrepresented work that he did after a long period of underachieving." (*page 4*), as if these paperwork submission items are correctly being described as fabricated acts when it is actually the substantive fact finding essence of the case.

13. Is it proper for the District Court Judge to state: "… even if Metro had misinterpreted the representations about the vanpool, Murphy still would have no claim. It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they are not transparent or false." (*page 3*), and then not allow fact finding procedures of transparency or mendacity?

14. Is it proper for the District Court Judge to state: "…it is unlikely that they (Murphy's supervisors and managers) discriminated against Murphy, with whom they shared protected traits." (*page 3*), when repeated unfair acts demonstrate unreasonable

Questions Presented for Review- Continued

maliciousness that can only be labeled as age and race bias?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States Court Of Appeal for the Fifth Circuit:

1. Jerry Murphy, Appellant – Petitioner/ pro-se
2. Deborah A. Richard, Senior Staff attorney for Metropolitan Transit Authority, Appellee-Respondent
3. Jeffrey C. Londa
   Michael D. Mitchell
   Stephen E. Hart
   Law Firm Of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
   Attorneys for Appelle-Respondent

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PETITION FOR A WRIT OF CERTIORARI
OPINIONS BELOW

The opinion of the United Sates Court Of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Southern District, which granted summary judgment in favor of the Respondent. The Fifth Circuit's September 1, 2004 opinion is printed here as App. 15-21. The District Court's March 22, 2004 Opinion for Summary Judgment is printed here at App. 21-26. This decision of the Fifth Circuit was petitioned for rehearing on September 14, 2004 (that petition of appeal is printed here as App. 1-14) and it was denied without comment on October 5, 2004. A Petition to Rehear at En Banc was submitted on October 18, 2004. The Fifth Circuit's Office of the Clerk responded refusing the submission on October 19, 2004.

STATEMENT OF JURISDICTION

This petition for a Writ of Certiorari seeks review of the opinion of the United States Court Of Appeals for the fifth Circuit entered on September 1, 2004.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUES

1. The rules applicable to this case are as follows:
Federal Rule Of Civil Procedure 56
Rule 56. Summary Judgment

....

(c) **Motion and Proceedings Thereon**... The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...

....

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set fourth such facts as would be admissible in evidence, and shall show affirmatively that the affidavits is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for a summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise

specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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2. The constitutional provision applicable to this case is as follows:

Constitution of the United States
Amendment VII – Civil Trials

In the suits at the common law, where the value of controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved... U.S.C.A. Const. Amend VII (West 1987).

3. The statues applicable to this case are as follows:

Texas Labor Codes § 21.001 Purposes:

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. § 2000e et seq.);

(2) identify and create an authority that meets the criteria under 42 U.S.C. § 2000e-5(c) and 29 U.S.C. § 633;

(3) provide for the execution of the policies embodied in Title I of the Americans With Disabilities Act of 1990 and its subsequent amendments (42 U.S.C. § 12101 et seq.);

(4) secure for persons in this state. Including persons with disabilities, freedom from discrimination in certain employment transactions, in order to protect their personal dignity;

(5) make available to the state the full productive capacities of persons in this state;

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(6) avoid domestic strife and unrest in this state;
(7) preserve the public safety, health, and general welfare; and
(8) promote the interests, rights, and privileges of persons in this state.

Texas Labor Code § 21.051 Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age of the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or
(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

STATEMENT OF THE CASE

Petitioner, Jerry Murphy brought suit against his former employer, Metropolitan Transit Authority, pursuant Title VII of the Civil Rights Act Of 1964 as amended by the Americans With Disabilities Act and/or the Age Discrimination in Employment Act. Jurisdiction was proper in the United States District Court for the Southern District Of Texas.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

Facts Material to Consideration of the Questions Presented:

Jerry Murphy was terminated from the Metropolitan Transit Authority (Metro or MTA) on October 10, 2002; at the time Murphy was age 59. Murphy is an African-American. These points are undisputed by the Defendant. Murphy is claiming party to a protected class in an issue of age and race discrimination, and is sighting that termination, under discriminatory practices, has adversely affected him by preventing his retirement from the Metropolitan Transit Authority, and limiting his employment opportunities at other entities. On September 5, 2003 Mr. Murphy filed a claim, *pro se*, against Metro for violating his equal employment opportunity rights, by race discrimination, under Title VII; and for discriminating against him in violation of the Age Discrimination in Employment Act. Included in the original claim was a failure to promote claim, and discrimination of disability, retaliation, and defamation claim.

Judgment for the Defendant was granted; the District Court at the Southern District of Texas sustained Metro's Motion for Summary Judgment on March 22, 2002, under the disposition that: "Murphy has shown no facts that Metro fired him because of his age or race." This decision was appealed to U.S. Court of Appeals for the Fifth Circuit on May 14, 2002 on the

grounds that the District Court had errored in its interruption of fact issues presented by the Defendant. On September 1, 2004 the U.S. Fifty Circuit affirmed the District Court's judgment on the grounds that "Murphy has not rebutted MTA's nondiscriminatory reason for termination." On September 14, 2004 Murphy retained counsel with the Tran Law Firm to petition the Court of Appeals for a rehearing on the grounds of evidence submission. (*Appendix Pages 1-14)* On October 5, 2004 the Fifth Circuit denied the petition for rehearing, without comment. Mr. Murphy, *pro se*, Petitioned For Rehearing En Banc on October 18, 2004. This petition was refused by the Office of the Clerk on October 19, 2004 with instructions that Murphy had '90 days to file a petition for certiorari with the U.S. Supreme Court from…the denial of a petition for rehearing.' Mr. Murphy, Petitioner/*Pro se*, is now submitting this Petition For A Writ of Certiorari to The Supreme Court of the United States. This petition is inside the appropriate time frame according to the rules.

I.)

In the Petitioner's Response in Opposition to Defendant's Motion for Summary Judgment (*docket item # 30*) the following items were provided the District Court as age and race discrimination issues:

(1) "Pitts (*supervisor Sales Force*) was lighthearted with his comments about the older members on his staff." (*page 12*) "There is an age difference of 15 years in Petitioner and his supervisor, Mr. William Pitts. Although he denies making any age referenced statements in his deposition, it can be shown he is capable of indiscretion humor, by evidence of his e-mail (dated 1-31-02) to Petitioner concerning 'Friday's dress code'.

Mr. Pitts was capable of lighthearted harassment humor." (*pages 14 & 15*)

(2) David McMaster (*Director Customer Service & Sales*) continued to assert on 11-15-02 to the Texas Workforce Commission, falsely: "…'that Jerry had confirmed to our analyst, his manager, his supervisor and co-workers that this was an active vanpool when it was not.' This is not a true statement. Petitioner never reported this van group as an active vanpool, only that a van was scheduled for delivery to make it an active van group. The delivery fell through and Petitioner reported it as soon as he knew. Petitioner reported it verbally to Pitts on 9-27-02, and in writing two times, first on 9-30-02 and next on 10-04-02 {*see Exhibits # 5*}. McMaster was provided Petitioner's 10-04-02 e-mail to Pitts on 10-14-02. He (*McMaster*) had no reason to report *what* (sic) he did to the Texas Workforce Commission (*on 11-15-02*) unless there was malicious intent. At the very least he should have began a process of carefully looking into what Pitts was doing, and saying, in his reports about the Petitioner. McMaster*'s* (*sic)* mind set was racially motivated *as* (*sic*) he continued to be careless in his oversight responsibilities." (*page 13*) ***Mr. McMaster is a white male and he has demonstrated racial profiling with this act.***

(3) "There were two black male (*including Murphy*) van reps in the past two years of Petitioner's employment, both were terminated. Since the van rep staff has increased to 6 (*from previously being only* 3 *during Murphy employment*) there was four opportunities to consider adding another black

male to the van rep staff, none has been added (*as of January 2004*); a white female replaced Petitioner's position. (*per Defendant's disclosure information*)" (*page 13*)

(4) "Favorable assignments were given to the other staff members, who were not black." (*page 13*) *There was* "...a pattern of unfair and unequal assignments that resulted in substantially different production credits for Petitioner in comparison to the other reps. Petitioner was rated as less than efficient to *his* (*sic*) co-workers and this allowed management to put him under a performance review. The unfairness is relative to the credited vans count given to the other reps for work they did not perform." (*page 14*)

(5) "He (*Murphy*) was the only rep given a verbal warning on March 27, 2002 for an activity that the three van reps worked on." (*page 13*) *The other two reps were white and Hispanic.*

(6) "There were two van rep terminations while Plaintiff was on staff, prior to his termination. One of the persons was black the other was white. Pitts gave testimony in his deposition that corroborated Plaintiff's recollection that the staff was advised to not discuss the reasons or circumstances related to the white reps termination; but this was not done for the black rep. As a matter of fact, the terminated black rep's character was frequently referred to in a comedic matter in staff meetings." (*page 14*)

(7) "There were frequent comments in staff meetings that had a racial overtone, when the president of METRO was often in the press during the period she was being challenged

about her educational credentials." (*page 14*) *The Metro president was a black female.*

(8) "There are grounds to suspect Pitts of age related discriminatory bias as he knew *plaintiff* (*sic*) wanted to stay with METRO until *he* (*sic*) reached retirement age, (see disclosure document page 1; Memo from Pitts to Murphy 6-21-02) 'thanks again for sharing your thought with me. I will help you any way I can to insure you are with METRO for a long time.'" (*page 15*)

(9) "It is with this background that Plaintiff *views* (*sic*) the clandestine manner of his performance review and then termination as being age and racially bias." (*page 14*) "The circumstantial evidence of this case is relative to a pattern of unfair and unequal assignments that resulted in substantially different production credits for the Plaintiff in comparison to the other reps." (*page 14*)

The above nine stipulations were presented in the Petitioner's Response in Opposition to Defendant's Motion for Summary Judgment on February 20, 2004. However, the District Court has stated that: "Murphy has shown no facts that suggest that Metro fired him because of his age or race."

There were more age and race related issues described in the Petitioner's last submission to the District Court: 'Petitioner Jerry Murphy Provides 2nd Response to Defendant Metropolitan Transit Authority's Surreply to Defendant's Motion for Summary Judgment' (*docket item # 35*)

(1.) (*see page 23*): "This was a correctly submitted vanpool (*Reliant/Creekriedge*) group that did not come on line as scheduled; and it is no different from other members of the staff whose vans failed, but they were not terminated for it. [The best way to identify

vans that failed is by viewing the reports the Petitioner requested, but was denied by the court through the Defendant's objection.] Mr. Pitts preferred to see a problem with this group so that it would discredit Mr. Murphy, which was a pretext for his discriminatory age related bias…Mr. Pitts was biased toward Mr. Murphy in this instance and in the same manner he was biased toward Mr. Murphy's Annual Performance Review. Mr. Murphy wrote to Mr. Pitts' managers on September 22, 2002 (see Exhibit 35 attached, Murphy's deposition Ex. 8-pgs. 30-32 (response letter to performance review 9-22-02)) pointing out factual errors in Mr. Pitts' evaluation of his production activities. Mr. Pitts' managers overlooked these errors of Mr. Pitts because of their racial biases towards Mr. Murphy. The result is Mr. Pitts has brought them to this lawsuit."
(2.) (*see page 27*): "…Mr. Murphy's overall rating was indicated as 'Does Not Meet' standards when it correctly calculates to 'Satisfies Most' standards. If calculated correctly, this would have allowed Mr. Murphy to not be under a Performance Improvement Plan status in the first place. Mr. Pitts' managers have refused to look closely at Mr. Pitts' methods of inconsistency in his supervision. In Mr. Murphy's rebuttal letter on September 22, 2002 to Mr. Pitts' performance review he gave the management a clear opportunity to look at inequities of Mr. Pitts' supervision. They either ignored or refused to look at it fairly; and in Mr. Murphy's mind, they demonstrated racial profiling when Mr. McMaster continued to discredit Mr. Murphy on November 15, 2002 to the Texas Workforce Commission."
(3.) Murphy sited Pitts in his EEOC complaint (although he denied this in his deposition) as saying: *you are having difficulty getting the benefits position*

because 'they have too many blacks already down there in benefits' (*R.464*)
Mr. Murphy felt there was a predetermined mindset to not promote him to be a benefit manager due to his race, and because of poor references from his local managers.

II.)
The fact issue, relative to the paperwork submission, is about two documents found in the Defendant's Motion for Summary Judgment {(1) The Group Information Report [*R. 519 or Excerpt #9*] and (2) the Financial Incentive Report [*R. 526 or Excerpt # 10*], and one other document submitted from the record to the Court of Appeals (3) The Metrovan Daily Ridership Log [*Excerpt # 11*]}; and the misunderstanding William Pitts had as to how the three documents verify that a van is active and operational. The Group Information Report (*R. 519*) which was submitted by the Petitioner to Melanie Shepard (*Business Analysis/Incentive Coordinator, Metro*) on 9-18-02 is described by the Defendant to represent a 'nonexistent' vanpool group'. (*Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, page 10, lines 5-7; R. 624*)

Mr. Pitts, according to his deposition testimony, thought the submission of the Group Information Report was an act that implied that a van was already delivered and operational. (*Excerpt # 22*)

Mr. Murphy has said, all along, this is not a correct description of procedures. The submission of the Group Information Report is the process that allows Ms. Shepard to prepare a Financial Incentive Report

(*R. 526*) document, which she gives to the van rep to deliver to a new van-group's coordinator/Primary Driver at the time the van is first installed. (*see page 9, Petitioner's Response in Opposition to Defendant's Motion for Summary Judgment, docket item # 30)*

It is because Pitts thought the Group Information Report submission-act was an indicator that a van was already operational, that he functioned with a disposition of entrapment to terminate Mr. Murphy. Even though Mr. Pitts' background with Metro (before his promotion to supervisor over both Sales Reps and Vanpool Reps) was that of a level 8 Sales Rep, he had been in his supervisory position for over a year when he made his incorrect assertion about why Mr. Murphy should be terminated. He should have known the correct vanpool installation procedures because he had been in his position long enough to know.

It was clear in his deposition on February 5, 2004 (nearly a 1 ½ years after Murphy's termination), that Mr. Pitts was still reporting incorrectly that Ms. Shepard does not give the first Financial Incentive Report to a van reps for delivery to the new van groups at the time of a van installation. (*Pitts' deposition page 14, section 1, Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, R. 562*): *"I would disagree that she gives an Incentive Report for a first-time van."*

It is a fact issue that there cannot be a misunderstanding about what month a van is operational, without a Financial Incentive Report for a van to function under. For Mr. Pitts to assert that Mr. Murphy misled management about a van being operational implies there was a Financial Incentive

Report for the Reliant/Creekridge van group to function under relative to the September paperwork submission.
The Panel Judges site: *Young v. Equifax Credit Info Serv., Inc., 294f. 3d 631, 635 (5th Cir. 2002)*
"Summary Judgment is proper...if there is no genuine issue to any material fact that the moving party is entitled to judgment as a matter of law."

There is a material fact issue relative to what constitutes an active vanpool group. The defendant contends that the submission of the Group Information Report implies a vanpool group has been delivered a van and the vanpool group is actively functioning. The plaintiff contends that it is the signed Financial Incentive Report document that constitutes that a vanpool group is active and functional under the Metro van program. Further it is the verified/signed Ridership Log that constitutes whether federal/HGAC funding will be allowed on a vanpool group.

The Metro van program is a partial reimbursement of van leasing expenses, which occurs monthly after a van group has verified that it has ridden 12 days (per rider) in a month, in an approved van.

It is the verifying of 12 rides that makes Mr. Pitts' accusations against Mr. Murphy inappropriate. A van (in this case the Reliant/Creekridge van group) could not be thought to be already operational in September 2002 when Mr. Murphy turned in his Group Information Report paperwork on September 18, 2002, because there were not 12 riding days left for the month of September. Any van must be functional and operational on or before the 16th of <u>any month</u> in

order to have 12 riding days (assuming a 5 day work week) under the Metro van program.

Secondly, the Financial Incentive Report document is a beginning of the month signature document that verifies the rider's intentions before he rides for the month. Mr. Pitts did not know this at the time of his deposition. He thought of the document as an end of the month document. (*Exhibit # 23, plaintiff's 2nd Response to Defendant's Motion for Summary Judgment*) However, the document has the following statement in its center: **"Please obtain signatures & fax to METRO RideShare @ 713-652-8962 by the 3rd working day of the month for credit."** The final verifying of a completed 12-day/month ride occurs with the submission of the Ridership Log (signed by the van-group's coordinator/Primary Driver) at the end of the month; and that is how reimbursement procedures are validated every month.

For Mr. Pitts to assert that Mr. Murphy caused misrepresentation of an operational van when he submitted his Group Information Report on September 18, 2002, it would have to mean that Ms. Shepard had prepared a September Financial Incentive Report for the van group to function under. However, there is only an October, 2002 Financial Incentive Report; implying she was not confused about what month in which this van was to be functional. Even though the Defendant indicated there were reports prepared to upper management that included this van group, Mr. Murphy did not see these reports, so he could not be responsible for them since he had no knowledge of them. It would be Mr. Pitts's responsibility to correct status reports of vans that go to upper management because he was the management level person that knew the correct status.

The fact that the Reliant/Creekridge van was only scheduled to be operational in October remains an undeniable fact because there was no September Financial Incentive Report executed for the Reliant/Creekridge vanpool group to function under.

If this van was not thought to be a September van by Ms. Shepard then Mr. Murphy could not have caused the confusion stated by the District Court: "In mid-September 2002, Murphy submitted paperwork for a new vanpool that he had been arranging; it lead supervisors and coordinators to believe that the pool had become active. This new group was reported to Metro officials, and Metro applied for federal funding for it. In early October, Murphy's supervisors discovered that the vanpool had never started operating." (*page 2*)

The District Court's interpretations of events are based on the court accepting Mr. Pitt's assertions about vanpool procedures as correct. However, this is not correct because the mid-September paperwork submission did not 'lead the coordinator to believe a pool had already become active' because she did not prepare a September Financial Incentive Report for the pool to function under. Additionally, it is unlikely Ms. Shepard applied for federal funding of this vanpool prior to it completing 12 riding days in October. The court has been misled by Mr. Pitts not being correct about vanpool procedures. In the same manner Mr. Pitts misled, and was not honest with, Mr. McMaster when he (McMaster) wrote in the 10-8-02 memo:

"(Jerry)… also informed his supervisor and manager of the delivery. The vanpool was never actually delivered and at no time following these reports did Jerry advise his supervisor, his manager or the

incentive coordinator that the vanpool had actually begun operation." *This is not a correct statement because evidence has repeatedly been shown that Mr. Murphy did keep Mr. Pitts advised of the exact status of the van delivery procedures. There is no evidence of a signed Financial Incentive Report for September to indicate 'Jerry reported the delivery'. However, there are several e-mails evidences that point to Mr. Pitts being kept up-to-date.* The Defendant's Motion for Summary Judgment rest on this hearsay statement provided by McMaster (*no testimony was provided*) who would be an *interested witness* in this case. The Supreme Court explained in *Reeves* that the lower courts should not base summary judgment on evidence that comes from interested witnesses. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 2110, 147 L. Ed. 2d 105, 120 S. Ct.2097 (2000). The Fifth Circuit holds that cases , which turn crucially on the credibility of witnesses' testimony, should not be resolved on summary judgment. Bazan v Hidalgo County, 246 F.3d 481, 492 (5th Cir. 2001), quoting Abraham v. Raso, 183 F.3d 279, 287 (3rd Cir. 1999). Secondly, a factual conclusion may only be reached from a summary judgment motion when it is 'the only reasonable interpretation' of the record. Blow v. City of San Antonio, 236 F3.d 293, 297 (5th Cir. 2001).*

The actual facts are these:

1.) On 9-27-02, the date the van was scheduled to be delivered, Mr. Murphy told Mr. Pitts, verbally, he was having difficulty making contact with the person to receive the Reliant/Creekridge van. While in the field for two deliveries that day Mr. Murphy called Mr. Pitts to update him that he still had not made contact with

the person to receive the second van (the Reliant/Creekridge van). Mr. Pitts instructed Mr. Murphy to cancel the delivery and return to the office. (*see Exhibits 5, Plaintiff's Response to Defendant's Motion for Summary Judgment, excerpt # 13, e-mail from Pitts to Murphy, Re: Creekridge No Shows*)

On 9-30-02 Mr. Murphy wrote the following e-mail to Mr. Pitts: "FYI: The appointment for Creekridge has been changed to Wednesday per Judi Walters (*Executive Director Administrative Services, Reliant Resources*). Also both (*Reliant*) van deliveries have been delayed due to riders' changes; at Creekridge we lost the primary driver because she was reassigned to the downtown location, and the downtown van still needs two more riders from Sugarland area to join. We are expecting the two events to produce the riders we need." (*see Exhibits # 5 or Excerpt # 14*)

2.) On October 1, 2002, 9: 38 AM, Mr. Pitts prepares an e-mail to Mr. Murphy stating: "I took the Creekridge *event* (*sic*) off the calendar today. Thanks" (*Excerpt # 14 & 26*)

This is another indication Mr. Pitts was told the delivery was not made since he took it off the department calendar.

3.) On 10-01-02, (about 10: AM) (*the day the Reliant/Creekridge van group should have begun operating*) Ms.Evangeline Soto-Chairez called a meeting of the van rep staff in her office to get an update on out-standing vans. Attending at that meeting was Jerry Murphy, William Pitts, John Nunez, Melanie Shepard and Evangeline

> Soto-Chairez. In that meeting Mr. Murphy said the Reliant/Creekridge van group was delayed because he needed to find a replacement driver since the current driver had been transferred; and that several of the van group riders were considering replacing the primary driver. Ms. Soto-Chairez then gave permission for the Reliant/Creekridge, and any other van group, to have until October 15, 2002 to have everything complete. (*Exhibit # 16, Plaintiff's 2nd Response [to Metro's] Surreply to Defendant's Motion for Summary Judgment).*

4.) On 10-03-02 Mr. Murphy submits his monthly report of September showing all his van deliveries for the month. The Reliant/Creekridge was not included as a delivered van; *therefore, this is another indicator there could not be any confusion that it was active.* (*R. 478-9*)

5.) On 10-04-04 in the weekly staff meeting Mr. Murphy made the same statement about the Reliant/Creekridge van driver being transferred, and the delivery delayed. Later that day in an e-mail to Mr. Pitts, Mr. Murphy again writes the following: *"Bill: There has not been a van delivery at Reliant, although two groups look very promising:...2) The second group was from Creekridge. This was a complete group formed (sic) of 8 (riders) from the first meeting on 9-18. Three people completed driver applications and all 8 made out the Group Information form. Approval was given of the Primary driver and the two alternates on Wednesday 9-25 and Simon*

(Enterprise Leasing rep) was ready to deliver the van for Friday. I started calling the primary driver on Wednesday, but had to leave messages because she does not have a direct line. On Thursday I made contact with one of the riders and asked her to pass on the message for the primary driver to call me. By Friday I had not heard anything so I canceled the delivery with Simon. On Monday I heard from the Primary driver that she had been transferred to downtown. I have polled 4 of the original people and they still want to be on a van. We need a leaseholder and/or another driver. I expected these 4, at least, to come to the meeting today and make a decision who would be the leaseholder. I will see what happens on Monday." (*see Exhibit # 5*) In the Metrovan program the Primary Driver is also the leaseholder of the van. When you lose a Primary Driver you lose the leaseholder of the van.

6.) September 10, 2002 Mr. Pitts writes a Performance instruction e-mail to Mr. Murphy: *"Jerry, I want to clarify that the Performance Improvement Plan you received as part of your most recent evaluation must be complied with regardless of any other conversations, discussions or other activities you chose to perform or are assigned to by management.*

To document your plans and activities use the MS Outlook Calendar and fill in completely with your activities between the hours of 8 and 5. No part of the day should be unaccounted for on the calendar." (*R.512, Defendant's Motion for Summary Judgment*)

Mr. Murphy offers this as example to the Court as to why Mr. Pitts had to know exactly what Mr. Murphy did and when, because Mr. Murphy was under direct performance instructions to report all of his activities, and he did.

Mr. McMaster was incorrect to say in his 10-08-02 memo that Mr. Murphy did not 'advise his supervisor, his manager or his incentive coordinator that the (*Reliant/Creekridge*) vanpool had not actually begun operation.' He had been misled by Mr. Pitts. Mr. Pitts may have made a mistake to assume the Group Information Report submission-act was a process that implied the van was operational, but he did not try to correct the mistake before terminating Mr. Murphy with this concept, even though he clearly knew that Mr. Murphy had kept him informed of the actual status of the van as it developed. Mr. Pitts was not honest about what he knew when he signed-off on Mr. Murphy's termination letter on 10-10 -02, which said: "...you did not inform METRO that the vanpool had dissolved due to external factors." *The vanpool group had not dissolved, and Mr. Murphy did inform Mr. Pitts of the status of the van group, verbally and in writing, on several occasions.*

III.)
The above is the same type of inconsistent, inert management style that Mr. Murphy shows is unfair age and race bias on the part of Mr. Pitts throughout his relationship with him; and since his immediate managers (white and Hispanic) would not investigate the matter, they showed racial bias themselves. There can be no other reason for so many management mishaps such as:

1.) Mr. Pitts and Ms. Soto-Chairez did not acknowledge that they had a van-delivery update meeting on October 1, 2002 where they were clearly informed about the status of the Reliant/Creekridge van situation. The same information was reported again at the weekly staff meeting on October 4, 2002, which was attended by Mr. McMaster (*McMaster normally does not attend the weekly staff meetings*).

2.) Mr. Pitts asserted that the van sales objective was set at 12 vans per year, or one van per month in Mr. Murphy's performance review, when the objective was only in the planning stage for next fiscal year according to his e-mail announcement to the staff on May 31, 2002.
It says the following: *"So you are prepared and informed well in advance, I'm in the process of developing minimum quotas or targets for the number of vans or ride sponsor accounts you generate. While there are many factors that go into reviewing job performance, as RideShare and Sales reps, generation of new vans or RideSponsor accounts is ultimately the reason you are here. Tentatively, this will start with the new fiscal year (which starts October 2002). ...Early thoughts are everyone will have to bring in a minimum of 12 vans or accounts a year. You might bring in one a month or two every other month, but you will need to achieve the minimum required on average to be considered successful in performance measures. Again this is preliminary."* (*Exhibit # 39 Murphy's deposition*)

3.) William Pitts wrote the following on 12-12-03 regarding Murphy's last performance evaluation that ended 8-11-02: "Jerry did not put enough vans on the road on his own. Jerry should have been putting an average of a van a month on the road, especially when

you consider the amount of time Jerry spent in the office. Jerry routinely came in early and worked late, working longer hours than any other Rideshare or Sales rep but produced the least amount of vans as you can see from other reps accomplishments." (*R. 535, Defendant's Motion for Summary Judgment) Pitts' above statement is not consistent with the chart he provided the court. (Exhibit 39, Plaintiff's Response [to Metro's] Surreply to Defendant's Motion for Summary Judgment) This shows Murphy's van count from September, 2001 through August, 2002 to be 11 vans.*

4.) The following is from Murphy's Rebuttal to his 8-29-02 Performance Review: (*Pitts writes*) "He (Murphy) has formed one new van to date this year, falling short of the planned twelve vans for fiscal 2002." (*Murphy's response:*) "When this was written I had 7 vans *(for the calendar year).* Currently, I have 10 vans completed inside the fiscal year. Even so, the goal of 12 for fiscal 2002 was never established; the goal of 12 vans was for the next fiscal year. I agree 12 vans is a reasonable minimum, and if I am allowed to be apart of the team of shared information and leads, 24 should be the average per person minimum." (*see R. 476*)

The differences in the above two messages is what Mr. Pitts does frequently. He is inconsistent with facts as it relates to Murphy's performance.

IV.)
The Court of Appeals restates several 'comments contained in Murphy's August 11, 2002 evaluation by Mr. Pitts' (*page 4 & 5*):

1.) "Jerry has made minimal contributions to date to the department objective of having 300 METROVans by the end of the year. He has formed one van to date this year, falling short of the planned goal of twelve vans for fiscal 2002."
However, this conflicts with Pitts' chart of van counts of all the reps in his deposition (Exhibit 11) that shows Murphy with 11 vans from September 2001 thou August 2002.

2.) "In June, Jerry was given a list of over thirty companies that should have been researched and contacted. Some have yet to be researched and contacted."
Murphy's rebuttal letter of 9-22-02 responded saying: '...my report to Bill showed all the companies had been researched and all had been contacted or attempted to contact by June 22nd.'

3.) "Jerry made the decision to continue working with El Paso energy for vanpool opportunities in spite of the fact they have excellent bus service...along with plentiful parking..."
Murphy's rebuttal letter of 9-22-02 responded saying: "For the record these are not the sentiments shared by the riders of the 3 newly formed vans of El Paso in Greenway." Murphy added 2 new vans in September 2002 with El Paso, and had 8 other vans pending when terminated, one more of which was with El Paso. (see Exhibit 39, Plaintiff's 2nd Response to Defense's Surepply, 3-22-02.)

4.) "Jerry made the decision this spring to send out a press release that was not approved as required and continued some activities against directions while keeping the activity hidden from management."

The press release item he is referring to is for an ad to be placed in the Angleton newspaper. They had requested an early draft copy to evaluate the lay out, it was not considered the final approved version. The project had been worked on by the three van rep staff members and Pitts knew this, however he gave a verbal warning to only Murphy. (R. 510)
It was this situation that Mr. Murphy first challenged Mr. Pitts' unfairness by going to H.R. and reporting the incident because nothing had been hidden from Mr. Pitts, and he did not give a verbal warning to the other staff members. HR directed Mr. Murphy to go through local management to work things out. In attempting to do this, Ms. Soto-Chairez responded with 'I am disappointed you took this matter out of the department;' and Mr. McMaster indicated, 'Don't worry about a verbal warning, it will not be apart of your permanent record.'

5.) "He (*Jerry*) continues to spend too much time working on small individual groups, as oppose to working at the corporate level through H.R. departments. He has been given reminders to re-focus his efforts on corporate accounts."
Murphy responded to this accusation in his Performance Review rebuttal letter 9-22-02: "Bill has contended that the other representatives' work with H.R. personnel to accomplish getting vans going, and this approach produces more vans. This statement has some merit; however, those H.R. personnel come to METRO needing help with their employee relations because of such things as corporate moves or merges. When leads from H.R. persons like these come in, they are never given to me. My effort to find new H.R. people with whom to work has not produced one open door opportunity. Therefore, as long as I still have to put vans on the

road, I would go back to forming vans from individual contacts. This is not to say I refuse to work with H.R. personal. Bill seems to want me to spend all my time establishing new HR contacts, but at the same time he gives the strong leads to someone else. Case in point: UT Medical has turned out to be a great account that has produced several vans. I was assigned the Medical Center in mid-February. While I was attempting to develop a relationship with HR personnel, I was critiqued on where I was going and why I was going there. I was required to provide a list of my activities, whereupon they reassigned the facilities in the medical between John Nunez and me (sic). John was given most of the facilities that had 100% subsidies for its employees.
Most importantly, I was never made aware that the University of Texas (UT) was expanding its interest in vanpooling and would be increasing its subsidy to enhance this opportunity. My telephone log shows how I was calling personnel at UT. Bill never let me know he was working with personnel at UT on a higher level. This is an example of how Bill kept important lead information from me and gave it to other reps. This type of example can be shown in other areas of the TMC (Texas Medical Center) Inc., Enron, El Paso, and Reliant. I have been asked to keep him informed on developments, but he is selective in what I am told." (R. 475-476)

V.)
The Court of Appeals' Circuit Judges write: "Every performance evaluation and nearly every correspondence in the record indicate Murphy's deficiency." (*see pg. 4)*
The following is from the plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment (Docket item # 30, page 7, lines 2-4):

"February 11, 2002 Plaintiff received a 'Completely Satisfies' rating on his semi-annual performance review. This marked the third consecutive six-month review since his employment each providing a 'completely satisfies' rating." (*Exhibit 11, provides performance evaluation pages for periods 3-01-01, 8-02-01 & 2-11-02. The panel is incorrect about its assertion.*)

For the Courts of Appeals panel Judges to assert 'every performance evaluation…in the record indicates Murphy's deficiency' they are obscuring the time frame of this case. Murphy's alleged performance deficiencies were of the last six months of his employment only. Murphy is asserting in his complaint that this harassment began after he went to HR to report the unfair treatment in the verbal warning of March, 2002. Shortly after that Pitts came to Murphy's office and suggested he apply for a position in benefits. It was after Murphy applied for the Manager of Benefits in April 5, 2002 that Pitt's again came to Murphy's office and said: 'If you get that position you'd be making more money then me.' (*Pitt's deposition page 164*)
It is from this time that Murphy's harassment intensified until he was given a negative and unfair performance evaluation in August 2002.

CONCLUSION:

The issues in this complaint are about age and race discrimination that the petitioner claims was the pretextual cause of Mr. Murphy's termination. The Court of Appeals stated that the Appelle presented non-discriminatory reasons for the termination when Murphy failed to provide prompt notice of a dissolved vanpool group. The District Court said Murphy

misrepresented work that he did after a long time of underachieving.

Murphy has shown the court that he did give prompt notice of communication about the vanpool group, Reliant/Creekrigde. Even so, the vanpool group had not dissolved, and confirmation of the group's continued interest was provided the court. Murphy's production performance was not deficient and his performance evaluation, which was reported as overall 'Does Not Meet' standards, was not calculated correctly; it properly calculates to an overall total of 'Satisfies Most'. Mr. Murphy should not have been under a 90-day Performance Improvement Plan (PIP).

The Court of Appeals reviewed this case 'assuming arguendo' that Murphy has established a prima facie case, leaving for Murphy to rebut Metro's non-discriminatory reasons for termination. The Court of Appeals and the District Court were misled by Mr. Pitts' incorrect understanding of standard vanpool procedures. Even so, it was his not telling the truth about the communications of the van's status that made Mr. Pitts' actions pretextual in this case. Mr. Pitts demonstrated discriminatory age and race biases against Mr. Murphy. Ms. Soto-Chairez and Mr. McMaster demonstrated race bias against Mr. Murphy when they terminated him for pretextual reasons.

In this presentation to the Supreme Court Mr. Murphy has had to present his case as a layman (*pro-se*). He has attempted to validated these issues with legal precedence. However, he asks the court to accept the Petition for Rehearing to the Court of Appeals that was prepared by The Tran Law Firm where by he provides more extensive legal precedence for the

issues of the case. (App 1-14). "MTA based its defense of Mr. Murphy's termination on false vanpool reporting as the sole violation of Mr. Murphy's Performance Improvement Plan that resulted in his termination. If Mr. Murphy had not violated his PIP, he would not have been terminated. MTA's non-discrimination reasons for terminating Mr. Murphy had been proven to be false."

Mr. Murphy asks the Supreme Court to correct this injustice done to him, by reversing the lower courts and allowing this case to go to trial by jury to resolve the dispute.

Respectfully submitted,

Jerry Murphy

Jerry Murphy
January 2, 2005

App. 1
04-20756
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY MURPHY

Plaintiff—
Appellant

V.

METROPOLITAN TRANSIT AUTHORITY

Defendant—
Appellee

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

PETITION FOR PANEL REHEARING

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TABLE OF AUTHORITIES

FEDERAL CASES:

Bazan v. Hidalgo County, 246 F.3d 481, 492 (5th Cir. 2001)

Blow v. City of San Antonio, 236 F.3d 293, 297 (5th Cir. 1999)

Celotex Corp. v. Catrett, 477 U.S. *at* 327, 106 **S.Ct.** *at 2555* (1986)

Quoting Abraham v. Raso, 183 F.3d 279, 287 (3rd Cir. 1999)

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51, 2110,

147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996)

St Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 443

(5th Cir. 2000)

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St Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 443

(5th Cir. 2000)

PETITION FOR PANEL REHEARING

Questions Presented:

- Whether the Non-Discriminatory Reason for Termination found in the Panel's Opinion was one that was Not Asserted By MTA And Not Supported By Evidence

- The Panel Overlooked Material Issues of Fact that Makes Summary Judgment Inappropriate.

- Whether the panel's opinion fails to adequately credit the record evidence that Appellee's reason for termination was false and pretextual.

1. TIIE **COURT** FOUND NON-DISCRIMINATORY REASON **FOR**

App. 5

TERMINATION WAS NOT ASSERTED **BY** MTA **AND NOT SUPPORTED BY** EVIDENCE.

The panels opinion overlooks the record evidence and reaches factual conclusions that are not supported by the record and are contrary to the argument presented by the Metro Transit Authority ("MTA"). In its opinion, the panel found that "[m]anagement finally terminated Murphy after the dissolution of a vanpool group that Murphy organized; Murphy failed to provide prompt notice of the dissolution to management (Opinion pgs. 4-5).

On the contrary, MTA's legitimate, non-discriminatory reason for its decision to terminate Mr. Jerry Murphy has always been that he submitted a document on ". . .a vanpool that did not exist" and stated "that the nonexistent vanpool was a 'go"'. (R. 354) The District Court's finding reiterated MTA's position by stating that "he lied about the existence of a vanpool. Metro fired him for this." MTA argues that the nonexistent vanpool violated Mr. Murphy's 90- day Perfoinance Improvement Plan ("Pm") and directly resulted in his termination. (337, *See* Appellee's Brief pgs. *5-6)*

The appellate record is devoid of any MTA argument or summary judgment evidence that support the Panel's opinion that Mr. Murphy was terminated for failing to provide prompt notice to management of the dissolution of a vanpool that he organized. The Court's finding assumes that a vanpool group that Mr. Murphy organized did exist and that he violated MTA

rules when he failed to provide prompt notice of the dissolution to management. Such finding cdnfirms an issue of material fact in Mr. Murphy's favor (that a vanpool existed) then presents a new non-discriminatory reason for terminating Mr. Murphy that was never asserted by MTA and not found in the record (violation of a rule requiring timely reporting of a vanpool dissolution). Summary judgment motions must be narrowly construed with respect to the arguments articulated in them. Such a motion can only be granted on grounds actually asserted by the movant. St. *Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 443 (th Cir. 2000) (for court of appeals to sustain summary judgment, grounds must have been raised below by the movant).

2. **THE PANEL OVERLOOKED MATERIAL ISSUES OF FACT THAT MAKES SUMMARY JUDGMENT INAPPROPRIATE.**

If the non-movant presents evidence creating a genuine issue of material fact, summary judgment is improper. *See* **FED.** R. Civ. **P.** 56[c]). Mr. Murphy presented uneontroverted summary judgment evidence that MTA's legitimate, non-discriminatory reason for his termination was false.

MTA argues that it had a noxdiscriminatory reason for firing Mr. Murphy: he violated the terms of a 90 day Performance Improvement Plan (PIP) when he presented a document for a vanpool that did not exist and stated that it was a "go." (Appellee's Brief pgs. *4-5)* As a result, MTA disseminated erroneous reports and information to both internal Metro management and to external partners. (Appellee's Brief pgs. 15)

There are several material issues of fact that are in dispute:

MTA argues that Mr. Murphy violated his PIP by filing a document on a vanpool that did not exist. (R. *354)* The panel's opinion ignores the fact that MTA has failed to provide any summary judgment evidence that the vanpool, that Mr. Murphy was attempting to initiate, did not exist. Defendant cannot rely on conclusory statements to establish that plaintiff has not presented evidence on an essential element of its claim. Rather, Defendant must demonstrate an absence of genuine factual dispute. *See Celotex Corp. v. Catrett,* 477 U.S. at 327, 106 S.Ct at 2555

Appellant argues that the vanpool did exist. The record supports that conclusion. The hand written entry of personal contact. information in the "Vanpool Group Information" Report by each of the participants and driver in the vanpool in question lends credence to Mr. Murphy's claim that a vanpool he organized existed and was not a fabrication. (R. 510) Even as late as October 13, 2002, the group of vanpool participants that Mr. Murphy organized still existed and were willing to proceed with the vanpool program. (R. 886)

3. THE PANEL'S OPINION FALLS TO ADEQUATELY CREDIT THE RECORD EVIDENCE THAT APPELLEE'S REASON FOR TERMINATION WAS FALSE AND PRETEXTUAL.

There is a material issue on whether or not Mr. Murphy deceived MTA regarding the status of the vanpool he organized. MTA concedes that Mr. Murphy "was attempting to initiate a new vanpool in the program."

(App.ejlee's brief pg. 5). The material issue of fact lies in the meaning of the September 20, 2002 "Vanpool Group Information" Report (R. 510) that Mr. Murphy submitted to Metro's RideShare incentive coordinator, Mrs. Melanie Shepard and his September 26, 2002 statement to the same person.

MTA argues that Mr. Murphy's two September 2002 actions were deceptive and lead them to believe that the new vanpool was operational and active. (Appellee's brief pg. 5) To support this contention, MTA only provides hearsay evidence in the form of an October 8, 2002 memo written by David McMaster where he makes hearsay allegations that Mr. Murphy's September 2002 document submission and statement meant that a van had been delivered and the vanpool began operation. (R. 836)

Mr. Murphy refutes MTA's claim of his mendacity and demonstrates that MTA was well aware of the exact nature of his new.vanpool.

Mr. Murphy carefully describes the MTA procedure to create a new vanpool and the steps needed to deliver the van to the new vanpool in order to make it operational. (R. 801-8 17)

In its opinion, the panel overlooks several evidence and arguments that demonstrate MTA's awareness that Mr. Murphy's alleged September statement that the vanpool was a "go" and that the "Vanpool Group Information" Report (R. 510) that he submitted was for a new vanpool and procedurally only set into motion the vanpool program's process that, among other things, delivers a van to the new vanpool group:

- MTA's recognition that "Vanpool Group Information" Report contains a comment that the driver for the vanpool was "Pending" reflect that they were aware that a vanpool was not operational because the approval of the vanpool driver was still pending (See Appellee's brief pg *5*, R. 338. and R 801, R 510)

- The September 26, 2002 reminder from Mr. Murphy's supervisor to deliver the van demonstrates that MTA was aware that his "Vanpool Group Information" Report and "go" statement did not mean a van had already been delivered to the new vanpool and that the vanpool was operational. (R. 869) On the contrary the evidence support Mr. Murphy's contention that his action represented only the initial steps to effect an operational vanpool

- Plaintiffs September 18, 2002 email to his supervisor regarding the vanpool in question demonstrate that he informed MTA that a van had not already been delivered because a driver had not been approved. (R. 857)

This Court has previously held that the Court may not properly consider hearsay evidence when deciding a motion for summary judgment. *See Hearn v. Greyhound Lines,* Case No. 3:97-CV-1483-R, UNITED STATES DISTRICT **COURT FOR** THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, 1998 U.S. Dist. LEXIS 11375, July21,

1998) *See Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (SthCir. 1992) (citing *Martin v. John W Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (Neither the district court nor the cfrcuit court of appeals may properly consider hearsay evidence in affidavits and depositions).

- The September 27, 2002 email that Mr. Murphy received from his supervisor reflect that MTA was aware that Mr. Murphy was still attempting to deliver a van to the vanpool in question. (R 876)

- Plaintiffs September 30, 2002 email to his supervisor confirm an ongoing dialogue that the delivery of the van to the vanpool in question was delayed due to the volunteer driver being transferred. (R 879)

The record evidence mentioned above demonstrates that MTA was aware that Mr.

Murphy's September 2002 actions were efforts to initiate the delivery of the van to the vanpool and was not deceptive representation that a vanpool was operational.

While the Defendants have only a burden of production (and not persuasion), that does not mean the mere assertion of facts by the Defendants — via interested witnesses — must be believed. To the contrary, it is quite striking in this case that MTA cannot offer even an iota of evidence coffoborating their claim that a vanpool did not existed and that Mr. Murphy's September 2002 communication deceived them into believing that it existed and was operational.

The notion that MTA's motion rests solely upon the hearsay statements (no testimony was provided) found in a memo prepared by an interested witnesses is crucial for three reasons. First, the Supreme Court explained in *Reeves* that the lower courts should not base summary judgments on evidence that comes from interested witnesses. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 2110,147 L. Ed. 2d 105, 120 5. Ct. 2097 (2000). Second, the Fifth Circuit holds that cases, which turn crucially on the credibility of witnesses' testimony, should not be resolved on summary judgment. *Bazan v. Hidalgo County,* 246 F.3d th Cir. 2001), *quoting Abraham v. Raso,* 183 F.3d 279, 287 (td Cir. 1999). And third, this Court may only reach factual conclusions on a summary judgment motion if they are the "the only reasonable interpretation" of the record. *Blow v. City of San Antonio,* 236 F.3d 293, 297 (th Cir. 2001). Given that a motion hinging entirely on the testimony of interested-witnesses (e.g., Green and Hauser) inherently calls their credibility into question, *Baron,* 246 F.3d at 492, their word alone cannot be accepted as truthful and their promise that they are telling the truth cannot yield "the only reasonable interpretation" of the evidence. if other words, because their testimony as a matter of law is subject to the jury's credibility assessment, *Reeves,* 120 S.Ct. at 2110, their word alone should not form the basis of a summary judgment.

The Court should construe the evidence in the light most favorable to Mr. Murphy and draw all reasonable inferences in his favor. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, *150-51,* 147 L. Ed. 2d *105,* 120 S. Ct. 2097 (2000). ffithepresent case, the district court inserted his opinion in determining that Plaintiffs summary judgment evidence on the existence of the vanpool was not credible and

accused him of lying when he relied on MTA's conclusionary statements and hearsay evidence that the vanpool did not exist. The panel has overlooked this error and has failed to recognize that the very existence of the vanpool is a material fact to the establishment of pretext.

The Supreme Court's unanimous decision in *Reeves* v. *Sanderson Plumbing Products, Inc., 530* U.S. 133 (2000) makes summary judgment in this case inappropriate because Mr. Murphy presents evidence that MTA's asserted reasons for the termination decision are false. In *Reeves,* the Court ruled that discrimination might be inferred solely from a plaintiffs *prima facie* case[2] and evidence that the employer's proffered reason for the employment decision is false. The Court found that the Fifth Circuit had erred by determining that to prove discrimination, the plaintiff had to submit additional, independent evidence of discrimination, thereby rejecting the "pretext-plus" requirement that previously existed in the circuit. *See, e.g., Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (t11 Cir. 1996). *Reeves* states:

2 The Panel assume that Mr. Murphy did present a prima facie case.

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is

> consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiffs prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Reeves, at 530 U.S. at 147-48 (internal citations omitted).

MTA based its defense of Mr. Murphy's termination on the false vanpool reporting as the

sole violation of Mr. Murphy's Performance Improvement Plan that resulted in his termination. If Mr. Murphy had not violated his PIP, he would not have been terminated. MTA's nondiscriminatory reasons for terminating Mr. Murphy had been proven to be false. For these reasons, the panel should rehear the portion of the case dealing with a finding of Pretext.

- CONCLUSION

Jerry Murphy respectfully asks this Court to withdraw its opinion and reverse the district court's summary judgment and remand it for further proceeding.

Respectfully submitted,

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App. 15

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
No. 04-20334
Summary Calendar

JERRY MURPHY, PLANTIFF
VS.
METROPOLITAN TRAISIT AUTHORITY, DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
03-CV-4804

Before Davis, Smith and Dennis, Circuit Judges, PER CURIAM: Jerry Murphy, appearing pro se, challenges his employment discrimination suit against his former employer, MTA. We affirm the district court judgment because Murphy has not rebutted MTA' s nondiscriminatory reason for termination.

I.

Murphy, a fifty—seven-year—old African American male, was hired by MTA to work on a program designed to promote and organize citizen—run shuttle van service for cooperating commuters, called Rideshare. Over the course of Murphy's employment his performance evaluations steadily declined, finally resulting in an overall unsatisfactory review. Because of his poor performance Murphy was placed in a ninety day performance improvement plan which required weekly reports to superiors of plans of action and progress. Murphy was ultimately fired when he allegedly misled

superiors of the status of a particular commuter cooperative group, causing inconvenience and losses for MTA.

Murphy alleges that he was fired, not for the stated reason, but because of his age and race. Murphy also applied for and was denied a promotion during his tenure at MTA.

Although a more qualified candidate was chosen instead of him, Murphy asserts that the failure to promote him was also due to discrimination.

Following his termination Murphy filed a complaint with the EEOC alleging age and race discrimination. The complaint was dismissed after an EEOC investigation, at which time Murphy filed suit in Texas state court again alleging race and age discrimination in MTA's failure to promote him and in terminating him. MTh removed the case to federal court and the district court granted the MTA's motion for summary judgment. Murphy now appeals that judqment.

II.

We review a grant of summary~ judgment de *novo* applying the same standards applying the same legal standards as the district court in determining whether summary judgment was appropriate. *Hudson* v. Forest *Oil Corp.*, 372 F.3d 742, 744 (5th Cir.2004) "Summary judgment is proper if - . . There is no genuine issue as to *any* material fact that the moving party is entitled to judgment as a matter of law." *Young v. Equifax Credit Info. Servs., Inc.*, 294 Ft3d 631, 635 (5th Cir.2002) . "In determining if there is a genuine issue of material .fact, this court reviews the evidence. in the

light most favorable to the non—moving party." *Performance Autoplex II Ltd. v. Mid—Continent Casualty Co.*, 322 F.3d 847, 853 (5th Cir.2003). Summary judgment must be upheld when the record provides a legal ground for the affirmance, regardless of whether the district court utilized or disregarded that ground. *S&W Enters., LLC, v. SouthTrust Bank of Ala., NA,* 315 F.3d 533, 537—38 (5th Cir.2003)

MTA argues that Murphy failed to present a prima facie case. For purposes of this appeal, however, we assume that Murphy did

present a prima facie case. Even assuming arguendo that Murphy has established a *prima facie* case, MTA has presented substantial evidence of valid, non-discriminatory reasons for Murphy's termination which have not, been sufficiently rebutted by Murphy.

See *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 u.s. 248, 253 (1981) ("[I]f the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee s rejection.'") . Metropolitan submitted numerous e—mails and written memoranda documenting problems with Murphy's job performance over the course of his two—year employment. Every performance evaluation and nearly every correspondence in the record indicates Murphy's deficiency. Management finally terminated Murphy after

Numerous comments contained in Murphy's August 11, 2002 evaluation demonstrate his failings at work:

> Jerry has failed to follow management directives, in performance of his duties, choosing to continue to pursue unproductive avenues rather than proven activities he was directed to use. Jerry has made minimal contributions to date to the department objective of having 300 METROVans by the end of the
> year. He has formed one van to date this year, falling short of the planned goal of twelve vans a year for fiscal 2002.

R. 374

> In June, Jerry was given a list of over thirty companies that should have been researched and contacted. Some have yet to be researched and contacted. Jerry has made the decision to continue working with El Paso Energy for vanpool opportunities in spite of the fact they have excellent bus service

the dissolution of a van pool group that Murphy organized; Murphy tailed to provide prompt notice of the dissolution to management purportedly causing costs and significant inconvenience. These reasons are sufficient to satisfy MTA's burden of demonstrating non—discriminatory reasons for Murphy's termination.

Given the legitimate reasons for Murphy's termination, which are strongly supported by the summary judgment evidence, the burden

- of proof shifts to Murphy to demonstrate that MTA's non-discriminatory reasoning was pretextual and that discrimination was the actual basis for the adverse

employment action. *Roberson* v. *Alltel Information S~rVs.*, 373 F.3d 647, 651 (th Cir. 2004). To carry this burden Murphy has made conclusory statements that the

> along with plentiful parking . . . . Jerry made the decision this spring to send out a press release that was not approve_ as required and continued some activities against directions while keeping the activity hidden from management. Jerry has elected to continue use of presentation and communication approaches that have not been successful in the past two years which he has been instructed to abandon.

R. 374—73.

> Jerry's strengths of persistence and need to know details continue to be areas that bog him down as well. He continues to spend too much time working on small individual groups, as opposed to working at the corporate level through H.P. departments. He has been given reminders to re—focus his efforts on corporate accounts.

R. 372.

reason for termination was a sham because others were not fired for similar behavior and because the vanpool dissolution situation was
a mere misunderstanding not deserving of termination. Murphy

produced no corroborating evidence to support these allegations regarding the dissolution of the vanpool. Murphy has further made uncorroborated allegations that subtle age and racist comments were made during the course of his employment. Allegations in and of themselves cannot undermine MPA's legitimate non—discriminatory reasons for termination or defeat defendant's motion for summary judgment. Nuwer *v. Mariner Post—Acute Network,* 332 F.3d 310, 314

(5th Cir. 2003)
Moreover, Murphy has produced no evidence that could undermine the poor performance evaluations that he received during his employment at MTA.[3] Murphy has not demonstrated that the reasons for his termination were pretextual and therefore has

not satisfied his burden, of proof.
Summary judgment was

appropriate.

For the reasons set forth above, the judgment of the district court is AFFIRMED)

[3]Murphy has forfeited his failure to promote claim on appeal. Appellant's Brief at 17—18 ("Even though *Mr.* Murphy relinquishes his claim of age and racial biases in his application for the manager' s position

On May 3, 2004, Murphy filed a Motion for Relief with the Court. Given the denial of Murphy's appeal on the merits that motion is denied as moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

JERRY MURPHY, Plaintiff
Vs.
Metropolitan Transit Authority, Defendant

Civil Action H-03-4804

United States Courts
Southern District Of Texas
ENTERED
MAR 23 2004

Michael N. Milby, Clerk Of Court

Opinion On Summary Judgment

I. Introduction

A 60-year-old , black male was fired. He says that it was because of his age and race. His employer says that it fired him for lying. The employer has moved for summary judgment and will prevail.

2. Background

Two events prompts Murphy's discrimination claims: (1) the denial of a promotion and (2) his termination.

In August 2000, Metro hired Jerry Murphy to work as a vanpool-development representative. He was 57. His duties included creating and maintaining vanpools for Houston-area companies . He had trouble doing his job.

In March 2002, Murphy's immediate supervisor, William Pitts, wrote Murphy, expressing his frustration

with Murphy's inability to complete tasks as directed. Murphy's performance did not improve. One month later, Murphy applied to be manager of benefits-a promotion. In late August, Murphy received a performance review that documented his deficient performance. That same day, Pitts and Murphy signed a performance improvement plan-a detailed list of how Murphy could fix problems in his work. The plan was to last 90 days. The plan also told Murphy that, if he was unable to improve, he risked discipline, including termination.

A week later, Murphy unsuccessfully challenged the performance review. David McMaster, one of Pitts's supervisors, found that Pitts's assessment was accurate. McMaster expressed his own criticism of Murphy's performance and urged Murphy to improve quickly.

That July, Murphy received notice that Metro had promoted a woman who was more than 40 years of age as manager of benefits.

In mid-September 2002,Murphy submitted paperwork for a new vanpool that he had been arranging; it lead supervisors and coordinators to believe that the pooi had become active. This new group was reported to Metro officials, and Metro applied for federal funding for it. In early October, Murphy's supervisors discovered that the vanpool had never started operating. On October 1o, Murphy was fired.

Murphy sues, saying that he received the negative evaluation, the denial of the promotion, and the termination on account of his age and race.

3. Promotion.

To prevail on his failure-to promote claim, Murphy must show that he was clearly the superior candidate. E.E.O.C *v. Louisiana Office of* Comm. Svcs., ~ F.d '438, **1145** (sth Cir. **1995).** He must also show that Metro failed to promote him because of his protected characteristics—in this case, his age and race. *Hazen Paper Co. v.* Biggins, **507** U.S. **604,** 609 (1993); *Elliott* v. Group *Medical & Surgical Service,* 714 F.2d 556 (th Cir. 1983). He has done neither.

Murphy admits that he was not more qualified to be manager of benefits than the woman whom Metro promoted. He also concedes that his race and age did not motivate the denial of the promotion. This ends that claim.

Murphy simply speculates that a supervisor's comments about him hurt his candidacy. He does not know which manager said something negative, and he offers no evidence of what was said. He merely suspects that his managers said something bad because they were on the same floor as the human resources director who interviewed him

Whatever was said, Murphy has not shown that his manager mentioned Murphy's age or race. The comments, then, cannot form the basis of a discrimination claim.

4. Termination.

Murphy says that Pitts gave him a unfavorable written review because of his age and race. He asserts that he was then fired based on **(t)** his age and race and **(2)** his challenge to the review. He does not distinguish between the age and race claims, saying only that Metro was plagued by ~ "racist and age-biased mindset."

The record directly contradicts Murphy's assertions. First, Metro hired Murphy when he was ~ If Metro was going to discriminate against Murphy, it never would have hired him in the first place.

Second, sixty percent of Metro employees are black. In fact, Murphy's supervisors were themselves protected-class members. Like Murphy, Pitts was a black man over the age of **40.** Evangeline Soto-Chairez, Pits's supervisor, was Murphy's same age. Her supervisor, David McMaster, was also more than **40** years of age. While possible, it is unlikely that they discriminated against Murphy, with whom they shared protected traits. *Taylor* v. *Proctor & Gamble Dover Wipes,* 184 F.Supp._d **402,413** (DOd. **2002),** *affld* No. **1701** (d Cir. Dec. **4,2002).** Murphy has offered nothing to show otherwise.

Last, Murphy's challenge to his review did not make him immune from being fired. So long as it did not fire him for his age or race, Metro could fire Murphy for whatever reason it chose.

Metro has demonstrated that its reason for firing Murphy was nondiscriminatory. Murphy was under scrutiny for performance problems. During this time, he lied about the existence of a vanpool. Metro fired him for this.

Murphy contends that Metro was wrong about what he said about the vanpool, but he concedes that he did submit paperwork for the group and did say that the van was a "go." Lie says, however, that he never represented that die group was active. Murphy views Metro's insistence that he lied as another example of continued mistreatment that he suffered. Murphy wishes away the paper record that he produced.

Mistreatment does not equal discrimination, and the facts show that Murphy fabricated his work record.

Second, even if Metro had misinterpreted the representations about the vanpool, Murphy still would have no claim. It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they were not transparent or falsc. *Mayheriy v.*

Vought Aircraft *Co.,* 55 F.d roB6, **1091** (sth Cu. **1995).** Metro has shown that they were not.

5. Conclusion.

Murphy has shown no facts that suggest that Metro fired him because of his age or race. He has only guessed andsupposed. Metro, on the other hand, has substantiated why it fired Murphy: he misrepresented work that he did after a long time of underachieving. Metro prevails, and Murphy will take nothing on the judgment.

22—

Signed **March** _____, **2004,** at Houston, Texas.

Lynn N. Hughes
United States District Judge

United States Courts
Southern District of Texas
Entered
MARCH 23 2004
Michael N. Milby, Clerk Of County

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT

JERRY MURPHY, Plaintiff

Vs

METROPOLITAN TRANSIT AUTHORITY, Defendant

CIVIL ACTION H-03-4804

FINAL JUDGEMENT

Metro prevails, and Murphy takes nothing on the judgment.

Signed March 22, 2004, at Houston, Texas.

Lynn N. Hughes *(signature)*
United States District Judge

Supreme Court, U.S.
FILED
JAN 31 2005
OFFICE OF THE CLERK

No. 04-902

IN THE

Supreme Court of the United States

JERRY MURPHY,

Petitioner,

v.

METROPOLITAN TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari in Petitioner's *pro se* case of alleged race and age discrimination, where the decision-makers are either the same race as Petitioner or are in the same age group as Petitioner, where Petitioner has failed to identify any non-protected class employees who were treated more favorably than him, and where Petitioner has failed to offer any evidence of a racial or age-based motive for his employment termination?

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STATEMENT OF THE CASE[1]

Petitioner filed this lawsuit *pro se* in the 151st Judicial District Court of Harris County, Texas, on September 5, 2003, against the Metropolitan Transit Authority ("Metro"),[2] alleging claims for race discrimination, age discrimination, disability discrimination, retaliation, and defamation. Metro timely removed Petitioner's lawsuit to the United States District Court for the Southern District of Texas, Houston Division on October 28, 2003. On February 13, 2004, Metro filed its Motion for Summary Judgment ("Metro's Motion"). (R. 333-532).[3] On March 22, 2004, the District Court granted Metro's Motion for Summary Judgment, finding no evidence of race or age discrimination. In this regard, the District Court noted that Petitioner's supervisors were either the same race as Petitioner or were, like Petitioner, over 40 years of age. (Petitioner's Appendix 25). The District Court also noted that Metro hired Petitioner at age 57 and fired him approximately two years later. (Petitioner's Appendix 22-23, 25). The District Court also found no evidence that Metro's reason for Petitioner's discharge was a pretext for race or age

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1. Unless otherwise noted, citations set forth herein are to the Fifth Circuit Record.

2. Metro is a public entity established by Texas Civil Statute Article 1118x pursuant to voter approval of a regional referendum held on August 12, 2978. Article 1118x is now codified in Chapter 451 et. seq. of the Texas Transportation Code.

3. Petitioner later abandoned his purported disability discrimination, retaliation, and defamation claims by failing to address them in his Response to Metro's Motion. Instead, Petitioner only briefed his allegations of race and age discrimination.

discrimination. (Petitioner's Appendix 25-26).[4] The Fifth Circuit affirmed the judgment of the District Court, finding

4. Long before the District Court dismissed this case, the EEOC did an exhaustive investigation of Petitioner's allegations and also dismissed them, finding no evidence of discrimination. Specifically, approximately 7 months after Petitioner filed a Charge of Discrimination with the EEOC on or about December 9, 2002, alleging race and age discrimination (R. 411), on July 10, 2003, EEOC Investigator Patricia Zuniga sent Petitioner a Pre-Determination letter, stating that there was no evidence of race or age discrimination. (R. 410, 468-70). In particular, Investigator Zuniga made the following findings: "[t]he evidence does not support the allegation that you were denied a promotion due to your race, Black, and your age, 59. . . . The evidence does not support the allegation that you were terminated because of your race, Black, and your age, 59." (R. 410). Petitioner, who apparently was not satisfied with Ms. Zuniga's findings, filed additional documents with the EEOC in an effort to support his race and age discrimination claims. (R. 386-409, 486-87). Subsequently, on August 1, 2003, Jim Sacher, then Acting District Director of the Houston District Office of the EEOC, issued a Dismissal and Notice of Right to Sue, stating that there was no evidence of discrimination. (R. 385, 466-67). In addition, Mr. Sacher sent Petitioner a cover letter with the Dismissal and Notice of Right to Sue explaining that "you have not provided any tangible evidence that rebuts Metro's defenses and we do not have evidence that the actions taken against you were motivated by you race and/or age, you (sic) charge is being dismissed." (R. 384). Petitioner filed yet another rebuttal letter with the EEOC on August 18, 2003. (R. 381-83, 462-463). Mr. Sacher wrote Petitioner another letter on August 20, 2003, explaining in detail why the information that Petitioner submitted to the EEOC was not evidence of race or age discrimination. (R. 379-80, 457-462). In his August 20, 2003, letter, Mr. Sacher noted that "[b]efore issuing the dismissal, I independently reviewed the information in the investigative file." (R. 379, 457). Further, Ms. Cynthia G. Pierre, Director of EEOC Field Management Programs in Washington, D.C., also sent Petitioner a letter (dated September 10, 2003), stating that she too had independently reviewed the file and found no evidence of race or age discrimination. (R. 378, 455-57).

no evidence that Metro's reason for Petitioner's discharge was a pretext for race or age discrimination. (Petitioner's Appendix at 19-20).

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal

> question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner's Petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve: (1) a conflict among United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; (3) a conflict on an important federal question among state courts of last resort; or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a garden variety claim of alleged employment discrimination. Moreover, the asserted error in this case consists of nothing more than allegations of erroneous factual findings. Those are precisely the type of allegations which Rule 10 provides are not appropriate for certiorari. Accordingly, Petitioner's Petition should be denied.

II. The Petition Fails On The Merits.

A. *Petitioner Failed To Establish A Prima Facie Case Of Race Or Age Discrimination.*

The District Court properly dismissed Petitioner's discharge claims because Petitioner failed to establish a *prima facie* case of race or age discrimination. To establish a *prima facie* case of employment discrimination, Petitioner was required to show that "(1) [he] is a member of a protected class, (2) [he] was qualified for [his] position, (3) [he]

suffered an adverse employment action, and (4) others similarly situated were more favorably treated." *Rutherford v. Harris County, Texas*, 197 F.3d 173, 184 (5th Cir. 1999); *accord Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998). At the District Court, Petitioner presented no summary judgment evidence that "similarly situated" employees outside of his protected class were treated more favorably than him in circumstances "nearly identical" to his. *See Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000). Not surprisingly, in his Petition for Certiorari, Petitioner fails to identify any evidence in the record establishing that "similarly situated" employees were treated more favorably. Consequently, the District Court properly dismissed Petitioner's discharge claims.

B. *Metro Had Legitimate Nondiscriminatory Reasons For Petitioner's Discharge.*

In addition to the fact that Petitioner failed to establish a *prima facie* case, the record establishes that Metro had legitimate, nondiscriminatory reasons for terminating Petitioner's employment and that Petitioner has no evidence that they were pretexts for race or age discrimination. Petitioner's employment was terminated because he presented paperwork to Metro for a vanpool that did not exist and stated that the nonexistent vanpool was a "go." (R. 412). By his actions, Petitioner set into motion the vanpool program's mechanisms that resulted in the distribution of reports and processing of documentation for Metro's reimbursement from the Houston-Galveston Area Council[5]

5. The Houston-Galveston Area Council ("HGAC") provides funding for Metro's vanpool program through a grant from the federal government. (R. 335-36).

for financial incentives resulting from the creation of a new vanpool. (R. 412, 424). Thus, Petitioner's actions resulted in the dissemination and publication of erroneous reports and information to both internal Metro management and to external partners, such as the Houston-Galveston Area Council. (R. 412).[6] Moreover, at the time of the incident, Petitioner was already on a performance improvement plan. (R. 429).

C. *Petitioner Failed To Show That Metro's Reasons Were Pretexts For Discrimination.*

The Fifth Circuit recently explained that an employment discrimination plaintiff who seeks to rebut an employer's legitimate, nondiscriminatory reason for an employment decision must show:

> either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).

Rachid v. Jack In the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

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6. Petitioner erroneously asserts that Metro's reasons for Petitioner's discharge are based upon hearsay. Contrary to Petitioner's assertion, Metro presented the reasons for Petitioner's discharge through business records, which are admissible under Federal Rules of Evidence 803(6) and (8). Further, Petitioner waived any such objection because he neither raised the objection before the District Court nor raised it in his initial brief before the Fifth Circuit. *See In Re Texas Mort. Services Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985) ("issues not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals.").

Petitioner failed to satisfy both prongs of the aforementioned standard. With respect to the first prong (i.e., the pretext alternative), Petitioner admitted in his deposition that he submitted paperwork for a van to Metro and stated that the van was a "go," but he contends his actions did not indicate the existence of an active van. (R. 425). Thus, Petitioner asserts that his supervisors were simply wrong or mistaken in their belief that he indicated the existence of an active van. *Id.* However, Petitioner's assertions miss the mark because "[t]he question is not whether an employer made an erroneous decision; *it is whether the decision was made with discriminatory motive.*" *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995) (emphasis added); *accord Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 979 (7th Cir. 2004) ("The employer's explanation can be foolish or trivial or even baseless so long as the company honestly believed in the reasons it offered for the adverse employment action."); *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) ("The factual issue to be resolved is not the wisdom or accuracy of [defendant's] conclusion that [plaintiff] was an unsatisfactory employee. We are not interested in whether the conclusion is a correct one, but whether it is an honest one."); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) ("In judging whether [defendant's] proffered justifications were 'false,' it is not important whether they were *objectively* false (e.g., whether [plaintiff] *actually* [engaged in misconduct]). Rather, courts only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless."). Thus, Petitioner's assertion that his supervisors were mistaken or that they misinterpreted his actions does not establish that Metro's reasons for his employment termination were pretexts for race or age discrimination.

Petitioner also failed to offer any evidence of a racial or age-based motive for his employment termination. In this regard, it is undisputed that the decision to discharge Petitioner was made by people that were members of Petitioner's protected classes. Petitioner contends that Metro discharged him because of his race and age. The primary person whom Petitioner contends discriminated against him based on race and age is William Pitts, who, like Petitioner is a Black man over 40 years of age. (R. 415-16, 475-76, 492, 499-500). Petitioner also contends that Mr. Pitts' supervisors, Mr. David McMaster and Ms. Evangeline Soto-Chairez, both of whom are over 40, discriminated against him. (R. 499-500).[7] However, it is well settled that there is a strong inference of *no* race discrimination when the plaintiff and the decision-maker are the same race. *See Taylor v. Proctor & Gamble Dover Wipes*, 184 F. Supp. 2d 402, 413 (D. Del. 2002) (finding no race discrimination where the decision-maker and the Appellant were both African-Americans); *accord Haywood v. Lucent Technologies, Inc.*, 169 F. Supp. 2d 890, 912 n.7 (N.D. Ill. 2001); *Anderson v. Anheuser-Busche, Inc.*, 65 F. Supp. 2d 218, 229 (S.D. N.Y. 1999); *Kendrick v. Penske Transp. Services, Inc.*, No. Civ. A. 98-2289-KHV, 1999 WL 450886, at * 8 (D. Kan. Apr. 13, 1999); *Walker v. Boys and Girls Clubs of America*, 38 F. Supp. 2d 1326, 1337 (M.D. Ala. 1999).

Similarly, Petitioner has failed to present any evidence to overcome the strong inference that someone within the protected age group (e.g., Mr. Pitts, Mr. McMaster, and Ms. Soto-Chairez) would not discriminate against other group members based on age. *See Brown v. CSC Logic, Inc.*, 82

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7. Indeed, in his deposition, Petitioner admitted that he and Ms. Soto-Chairez are the same age. (R. 499).

F.3d 651, 658 (5th Cir. 1996) (finding that the fact that the decision maker was over 40 years old strengthened the "same actor" inference in Plaintiff's ADEA lawsuit); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1001 (5th Cir. 1996) (Garza, concurring) (stating that there was no evidence of age discrimination where the decision makers, the retained employee, the replacement employee, and the plaintiff were all over the age of 40); *accord Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991); *Wathen v. Allisen Engine Co.*, 102 F. Supp. 2d 1015, 1025 (S.D. Ind. 2000); *Coblentz v. Glickman*, No. Civ. A. 98-3645, 1999 WL 816266, at *7 (E.D. La. Oct. 13, 1999); *Jones v. University of Texas*, No. CA 3:97-CV-0845-R, 1998 WL 460283, at *10 (N.D. Tex. Jul. 29, 1998). Petitioner presented no evidence to counter these inferences of nondiscrimination.

In addition, Petitioner presented no evidence that would overcome the presumption of nondiscrimination under the "same actor" doctrine. In this case, the same Metro manager, David McMaster, hired Petitioner and recommended Petitioner's discharge in little more than two years. (R. 422-23, 476, 503). Under the "same actor" doctrine, a presumption of nondiscrimination arises where the same manager hires and discharges a minority employee within a short period of time. *See Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 n.3 (5th Cir. 1997); *Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997); *Brown v. CSC Logic Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Coleman v. Exxon Chemical Corp.*, 162 F. Supp. 2d 593, 630 (S.D. Tex. 2001); *Tiemeyer v. Quality Publ., Inc.*, 144 F. Supp. 2d 727, 736-737 (S.D. Tex. 2001); *Martin v. Kroger Co.*, 65 F. Supp. 2d 516, 551 (S.D. Tex. 1999). In his deposition, Petitioner admitted that David McMaster hired him and was also one of the individuals who recommended that Petitioner's employment

with Metro be terminated. (R. 412, 422-23, 476). Simply stated, Petitioner failed to present or identify any evidence of race or age discrimination to overcome the presumption that Mr. McMaster did *not* discriminate against him based on race or age. Therefore the District Court properly granted Metro summary judgment on Petitioner's discharge claims.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court Of The United States

JERRY MURPHY,
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vs.

METROPOLITAN TRANSIT AUTHORITY,
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On Petition for a Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This is a case of age and race discrimination in employment termination that has moved to the Supreme Court on issues of credibility of the litigants. There are fact issues unresolved relative to what constitutes a vanpool becoming active. The Respondent offers that a vanpool is assumed to be active with the submission of a certain document, the Group Information Report. (*R. 351*) The Petitioner insists that this is not the correct document to verify that a vanpool is active, that this is only a set-up document. The document, which does verify that a vanpool has become active, is the Financial Incentive Report, *R. 344*, and it was not returned completed and submitted. The correctness of the documents is significant because this particular document submission act is alleged to have caused confusion in relation to the operational status of a particular vanpool group, (Reliant/Creekridge). Additionally, the Petitioner suggests the termination was incorrect because it was based on pretextual reasons, and that the actual reason for termination was because of age and race bias. The Respondent has disputed the appropriateness of the charge because the litigants can be said to be members of the same classes. Even so, the Petitioner asserts that circumstances of unreasonable and malicious abuse legitimize the claim of discrimination when there is no other reason for such abuse. The Respondent has also held that it is protected from deformation claims because of its sovereign immunity as an agency of the state. It is clear, however, that the Petitioner's character has been diminished as illustrated by the words used by the District Court Judge when he stated: "he (*Murphy*) lied about the existence of a vanpool" (*pg. 3*). It is because of this type of characterization that the

Petitioner must defend his name and reputation. Termination of employment under implied circumstances of ethical abuse, (e.g., 'the appearance of impropriety', *R.412*), has ended his immediate income and has prevented future income in employment. It is impossible for the Petitioner to accept in a small closely knit working environment, *R. 338, lines 8-15*, (a staff of three vanpool representatives) with the Petitioner's office being directly across the hall from the Supervisor and Director, that such punitive, scathing, accusation of work ethic violations can be made without consideration of age and race bias. The Court is being asked to equally consider circumstantial evidence in its review of this case. The Court of Appeals reviewed the case 'assuming arguendo' that the Petitioner had established a prima facie case. The Respondent in its Brief in Opposition to the Petition for a Writ of Certiorari indicated that the 'Petitioner fails to identify any evidence in the record that "similarly situated" employees were treated more favorably.' (*Page 5*) The Petitioner disagrees and points to page 8, lines 19-23, Plaintiff's Response to Defendant's Motion for Summary Judgment, and page 2, lines 3-18, of the Reply Brief of the Appellant to the Court of Appeals. The Petitioner has correctly presented a prima facie case for the Court to address an issue of discrimination. The Lower Courts' decision should not be allowed to stand because it raises the bar of proof of discrimination to a level that is not attainable in any case.

REASONS FOR GRANTING THE WRIT

The issue in this case is whether a Summary Judgment decision was an appropriate forum when significant fact issues were not resolved. There is

continued assertion by the Respondent that the non-discriminatory reason for termination was: "Petitioner's employment was terminated because he presented paperwork to Metro for a vanpool that did not exist and stated that the nonexistent vanpool was a 'go'", (*page 5, Brief in Opposition*). It is significant that the Supreme Court review fact issues of this case because the Lower Courts' decision has allowed this Respondent (and I assume others) to by-pass the essence of Federal Rule of Civil Procedure 56 [c] on Summary Judgment by accepting that there is no issue of material fact in dispute.

The Petitioner insists there are fact issues in dispute:
1.) The Petitioner did not present paperwork of a vanpool that did not exist.
2.) The Petitioner did not state that a nonexistent vanpool was a 'go'.

The District Court Judge based his decision on the belief that the Respondent's presentation was correct and factual when it wrote: "Murphy wishes away the paper record that he produced…and the facts show that Murphy fabricated his work record." (*pg. 3*) Additionally, the District Court Judge writes: "…even if Metro had misinterpreted the representation about the vanpool, Murphy would still have no claim. It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they were not transparent or false." (*pg. 3*) Likewise, the Respondent writes: "…the 'Petitioner's assertions miss the mark because "[t]he question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motives." *Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1091 (5th Cir. 1995)*

The Petitioner insists that there were two decisions made by the Metro managers:
1.) One was a decision to terminate based on paperwork submission prior to a van delivery.
2.) The second decision was to deny Murphy's updating of communications about the status of the van pool group. (*R. 549-551*)
If the first decision was an error on Metro management's part it still does not excuse the second decision; and it is the second that is the pretextual, discriminatory, cause for this lawsuit.

The Panel Judges wrote: "Management finally terminated Murphy after the dissolution of a van pool group that Murphy organized; Murphy failed to provide prompt notice of the dissolution to management purportedly causing cost and significant inconvenience." (*pg. 4-5*)

The Judges were misled on three points:
1.) The vanpool group had not dissolved because approval was given for the group to have extended time to come on line. (*R.080*)
2.) The pending status of the group was promptly reported and updated to management by Murphy. (*R.549-551*)
3.) The alleged dissolution did not cause cost and significant inconvenience, because the vans are paid for at the end of the month after verifying 12 rides per rider. (*R. 838*) Since this particular van never began operating it never generated cost.

It is the misunderstanding of the use of the word 'cost' not the word 'go' that is the difference in what is thought to be a problem in this case. Ms. Shepard, Incentive Coordinator, did not think that this vanpool group was already operational with Mr. Murphy using

the word 'go' because she prepared an October Financial Incentive Report not a September Financial Incentive Report. The 'cost' related to a van being operational is based on to two types of monthly documents: (1) the Financial Incentive Report used at the beginning of the month to verify that riders intend to ride. This document is due back to Ms. Shepard by the 3rd working day of the month in which the van is active; (2) the Ridership Log document is used at the end of the month to verify that the riders have completed 12 rides before getting a $35 credit towards the 'cost' of riding in the van. This document is due back to Ms. Shepard by the third working day of the month following the ride month.
Obviously, Ms. Shepard would not imply that she felt a van was generating 'cost' in a month that she had not prepared a Financial Incentive Report under which it must operate in order to get 'cost' credits.

Reeves provides: "...a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the tier of fact to conclude that the employer unlawfully discriminated." *Reeves at 530 U.S. at 148, 120 S. Ct. at 2109* Additionally, there is precedence set in *Reeves v. Sanderson Plumbing Products* that summary judgments should not be based on evidence that comes from interested witnesses. In this case Mr. David McMaster, Director Customer Service and Sales, makes the allegations against Mr. Murphy in his October 8, 2002 memo (*R. 412*). This is the only evidence submitted by the Respondent to support its action of termination. Mr. McMaster would be an interested witness, as such his assertions should not be the basis of a summary judgment decision. Removing Mr. McMaster's assertion that Murphy did not inform his supervisor 'that the vanpool had not

actually begun operation' leaves nothing on which to base the termination. The Petitioner has provided proof that he did inform his supervisor that the vanpool had not begun operations, *R. 549 & 550.* The Respondent, however, asserts that the Petitioner is responsible for status reports about the van being active which went to upper management. This would only be practical if Mr. Murphy was in the flow of the upper management reports with the misinformation. The flow of these reports did not come to Mr. Murphy's desk so he cannot be held responsible for what was in them. Mr. Murphy did provide his input of his activities in the staff's Monthly Report of van deliveries, *R. 413-414.* Murphy did not report the disputed van as delivered, only that it was forming. This removes any basis for Mr. Murphy to be responsible for any incorrect status reports going to upper management on this vanpool group.

The Defendant writes in his Surreply to Plaintiff's Response to Motion for Summary Judgment, at page 3, footnote #4: "Plaintiff does assert that his communications to Ms. Shepard were proper because there was an 'active vanpool' in the sense that there were still people at Reliant Resources interested in forming a van on September 26, 2002. That assertion misses the point, however, because Ms. Shepard took the aforementioned action in reliance on Plaintiffs representation to her that the van was a 'go'."

The unresolved issue is whether any misunderstood statement can imply that a van is operational when the Petitioner is insisting the only instrument that correctly indicates that a van is operational is a completely signed Financial Incentive Report, which must be returned to Ms. Shepard each month before the van begins operation.

As the Respondent continues to assert that the Petitioner 'presented paperwork to Metro for a van that did not exist' (*pg. 5*), he invokes a fact issue under Rule 56 where: '[t]he moving party bears the initial burden of "informing the Court of the basis of its motion," and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).*' The Respondent has not presented any evidence that the vanpool group did not exist. They have only presented a memo document from Mr. McMaster dated 10-8-02 (*R. 412*). This document only asserts that Murphy submitted the paperwork, and then (incorrectly asserts) Murphy reported the group was "a go" and 'informed his supervisor and manager of the delivery'. There is nothing in this document about a van that did not exist. The Petitioner, on the other hand, did present evidence that the vanpool group did exist, *R. 067 or 553.* Since the document submission, and what the submission act is purported to represent, is a material fact issue, it should not have been resolved in a summary judgment forum. 'A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).*

A jury question is created in this case because there is no evidence supporting a cause for termination that was found in the record and presented by the Respondent. In the absence of any provable evidence presented as the reason for termination, the Petitioner has asserted that the issues raised for termination are pretextual and false; the actual reasons for termination are due to age and race discrimination. The Petitioner has presented more than nine pretextual reasons of

age and race discrimination. (*pages 6-11, Petition for Writ of Certiorari*)

To these charges the Respondent has responded that the Petitioner is of the same classes as the Respondent and therefore the charges are not appropriate. Additionally, the Respondent has indicated that termination was recommended by the same person that hired him two years earlier. To this list the District Court Judge added that the Petitioner worked for an employer that had a 60% African American workforce (*pg. 3*).

Addressing the last point first, the Petitioner provided in his appeals' brief that he was an exempt employee in a department comprised of about 10% African Americans as exempt employees. Although the Petitioner, Mr. Jerry Murphy, was hired and terminated by Mr. David McMaster, a white male age 44 at the time of termination, the Petitioner did not work directly for Mr. McMaster. Mr. McMaster relied on his manager, Ms. Evangeline Soto-Chairez (age 59, Hispanic) and his supervisor, Mr. William Pitts (age 43, African American) to advise him of activities of the van rep staff. Mr. McMaster had a total staff of about 50 hourly and salaried employees. Mr. Murphy (age 59, African American) was a part of the salaried staff and reported directly to Mr. Pitts. Mr. Pitts demonstrated age and race bias toward Mr. Murphy in his assignment of accounts that had corporate subsidies. This caused a difference in van production credits when compared to the different van rep staff members. Van production is the only alleged deficiency of Murphy's performance evaluation.

CONCLUSION

The Court of Appeals provided the reason for termination as being: "Murphy failed to provide

prompt notice of the dissolution to management." (*pg. 5*) This assertion has been proven to be false from the evidence provided. The Petitioner did report the status of the developing vanpool group in a timely fashion. The evidence provided was written communications, *R. 549-551 & R. 068-070.* The Respondent's response to these written e-mail evidences was: "That argument is nonsense. It shows nothing, other than Mr. Pitts was mistaken or that he had forgotten about the e-mail messages." (*pg., 2, footnote #3, Defendant's Surreply to Plaintiff's Response to Defendant's Motion for Summary Judgment; docket item # 31*) However, the Petitioner also provides Mr. Pitts' e-mail of 9-12-02 where he wrote that a condition of Murphy's Performance Improvement Plan was to keep him informed of his activities at all times. (*R. 353*) The argument then is not 'nonsense' because it verifies Pitts' reason for termination to be pretextual and discriminatory for his age and race bias.

The District Court Judge indicated: "...he lied about the existence of a vanpool. Metro fired him for this." (*pg. 3*) The Petitioner has shown with written evidence that the vanpool group was still interested in vanpooling as late as October 13, 2002. (*R. 067 or 553*), therefore the vanpool group did exist. It is because the vanpool group was given until October 16th to be completely on line by the RideShare Manager, Ms. Evangeline Soto-Chairez, that the termination is pretextual for age and race bias. (R. 553 & R. 080)

Mr. McMaster communicated with the Texas Workforce Commission on 11-15-02 indicating that Murphy had reported 'that the van was in operation... the reporting of it as an active van when it was never

an active van' was the reason for termination. (*R. 907*) Mr. McMaster continued to report this inaccurate information even though the evidence shows he knew differently according to e-mails to him from Pitts on 10-14-02 (*R. 549*) and on 10-15-02 (*R. 855*) This evidence confirms that Mr. McMaster allowed the termination for the pretextual reasons of age and race bias.

The Respondent has indicated that this case has not established prima facie. The Petitioner has previously provided that he is (1) a member of protected classes by being African American and age 59 (when terminated), (2) he is qualified for sales and management level positions because he has more than 20 years experience in both areas, (3) he has suffered an adverse employment action by termination, and (4) there are similar situated employees, outside of his protected classes, who were treated more favorably than he. Those employees are Troy Macom (age less than 40, white), John Nunez (age 55, Hispanic), and Beverly Elam-Homer (age 51, white). These persons were provided preferential assignments of accounts that had corporate subsidies that allowed for establishing easier vanpool accounts; additionally they were not terminated when their vans did not come on line as scheduled. To be able to name specific accounts the Petitioner would have to review the documents that the District Court denied in the Plaintiff's Motion to Compel (*docket item # 22*).

The summary judgment decision in this case was not based on factual information, because of this the Supreme Court should reverse the Lower Courts.

Respectfully submitted,

Jerry Murphy

Jerry Murphy, Pro Se Petitioner; 2/8/05

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On Petition for a Writ Of Certiorari
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For The Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

This Supplemental Brief is submitted, according to Rule 15 (8), to address a new issue raised by the Respondent. In the Respondent's Reply brief he took the liberty to categorize the EEOC investigation into this case as an 'exhaustive investigation of the Petitioner's allegations' (pg. 2). The Respondent states: "Specifically, approximately 7 months after Petitioner filed a Charge of Discrimination with the EEOC on or about December 9, 2002, alleging race and age discrimination (R. 411), on July 10, 2003, EEOC Investigator Patricia Zuniga sent Petitioner a Pre-Determination letter, stating that there was no evidence of race or age discrimination. (R. 410, 468-470)." (pg. 2, Brief in Opposition)

These statements seem to imply that the time frame referenced is for a period of exhaustive investigation into the issues of this case. Actually, the time frame of this EEOC investigation by Ms. Zuniga took one day in spite of the fact that she was in possession of the case for nearly 7 months. According to her statement made to Mr. Murphy when he called on July 3, 2003 to inquire about the case, Ms. Zuniga had not had an opportunity to review the case because she had been busy on higher priority cases. Mr. Murphy met with Ms. Zuniga on July 9, 2003. On July 10, 2003 she prepared her predetermination letter.(R. 410) Although METRO had provided its response to the EEOC inquiry on ***January 14, 2003***, Mr. Murphy had not been informed of the response until July 9, 2003. This was the basis of Mr. Murphy's letter to the Acting-Director of EEOC, Mr. Jim Sacher, on July 13, 2003.(R. 408-409) Mr. Murphy's concern was that factual issues had not been resolved prior to a predetermination of establishing whether

or not age and race discrimination had occurred. Mr. Jim Sacher responded with: "It is clear that you believe that you have been mistreated and that your employer has not been candid with us. It does not follow, though, even if it is true, that the reason for the adverse action against you is motivated by discrimination against you because of your race and/or age."(R. 384) In addition, he reconfirmed that Mr. Murphy, an African American, was the same race as his immediate supervisor (Mr. Pitts) and other supervisory persons were of minority groups. These points were, however, provided in the EEOC intake interview in December 2002, and were not points discovered from a 7 month investigation.

The EEOC failed to establish a true factual reason for the termination. They accepted METRO's asserted reasons for termination as legitimate when EEOC restated, in Ms. Zuniga's letter on July 10, 2002, that the reason for termination was: "*...because of your work performance and was the result of your failure to notify your supervisor that a vanpool was inactive.*" (R.410) Even though conflicting evidence was provided the EEOC they did not investigate the accuracy of METRO's assertions. In this same manner EEOC did not investigate the issues of van production credits which were the basis of Mr. Murphy's negative Performance Review on August 29, 2002. Mr. Murphy provided the EEOC his Rebuttal Letter of 9-22-02 where he challenged Mr. Pitts' van production assertions. (R. 393- 395) The EEOC did not investigate the legitimacy of the performance evaluation and it remains an issue of contention in the dispute of this case. This misapplication of fact issues has remained the central point of the Petitioner's complaint, which was never resolved in the EEOC investigation. The EEOC repeatedly asked Murphy to provide proof of age and race discrimination. Murphy repeatedly said the proof of age and race discrimination is illustrated by the fact nothing METRO says

about Murphy's performance or the reason for his termination is true, and evidence shows it is not true; therefore, the only thing that is left is age and race discrimination.

METRO responded to the EEOC initial inquiry on January 14, 2003 (titled: Response to Charge of Discrimination) with the following comments on its third page:

"*Beginning in mid-September, during the performance improvement period, the Charging Party became involved in a situation that cast doubt on his credibility and judgment. He was attempting to get a new vanpool to join the program. He presented paperwork for this vanpool to METRO's RideShare incentive coordinator for input into the RideShare system,* ***and later he represented to her that the vanpool was an active vanpool.*** *By these actions,* ***Murphy set into motion the vanpool program's mechanics that resulted in the distribution of reports*** *and processing of documentation for METRO's reimbursement from HGAC for financial incentives resulting from the creation of a new vanpool. In reality the vanpool never became active.* ***By allowing the inactive vanpool to continue in the system as active while he attempted to find a new driver,*** *the Charging Party's action resulted in the dissemination and publication of erroneous reports and information to both internal METRO management and to external partners, such as the HGAC.* ***Had Murphy simply notified his supervisor when the vanpool collapsed,*** *the RideShare managers would not have made representation,* ***based on his misrepresentations,*** *to METRO management and external partners that turned out to be false.*

The Charging Party's actions demonstrated to his superiors that ***he did not exercise good judgment with respect too the vanpool situation, nor did he communicate honestly with his supervisor and co-workers on the matter of the collapsed vanpool.*** *The latest incident was merely a* ***continuation of deficient performance that Murphy had demonstrated in the past.*** *As a result, David McMaster, Director of Customer Service and Sales, a white male, age 44, recommended termination of his employment with METRO."* (R.061-158 Initial Disclosures Items, {docket item # 15}) [The items, in bold print above, are to indicate those items the Petitioner have disagreement.]

The unresolved factual issues of this case made it possible for the District Court Judge to state: "It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they were not transparent and false." The Judge was not able to see in this case that METRO was in fact transparent and false, because items indicated by the bold print above are either transparent or false. The EEOC could have resolved these items of dispute with a simple investigation into the issues.

The Respondent wants the Supreme Court to believe there was an 'exhaustive investigation' over a 7 month period into the issues of this case. That did not happen and the factual issues of this case are what make the case pretextual for age and race discrimination.

The Respondent has indicated this petition does not satisfy the Court's requirements for granting certiorari, because the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law.

The Petitioner asserts that the Court should act on this matter because the lower court has so for departed from the usual course of judicial proceedings as to call for an exercise of this Court's Supervisory power.

Respectively submitted,

Jerry Murphy, Pro Se Petitioner

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For The Fifth Circuit

PETITION FOR REHEARING IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR REHEARING

This case was denied a writ of certiorari on March 7, 2005. The Petitioner, Jerry Murphy, now files this appeal on the grounds of fairness in Equal Employment Opportunity discrimination cases.

The Petitioner assumes the Court has denied this petition for the reason presented by the Respondent, that the issues of this case 'do not satisfy the Court's Requirements for Granting Certiorari'. To this point the Petitioner offers the following to the Court.

According to Rule 10, the Court has judicial discretion over matters that 'so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers'.

The complaint of this case was for employment discrimination on the basis of age and race that ended in the Petitioner being terminated. At the outset the Petitioner indicated that the stated reasons for the termination were not true, correct, or factual; and in fact the stated reasons were pretextual for age and race discrimination. The Petitioner was asked to provide proof of age and race discrimination. To this request the Petitioner has responded that the examples of age and race discrimination are provided in the circumstantial evidence of how Mr. Murphy was treated differently from the other employees. Mr. Murphy was assigned the least favorable areas (low subsidy areas) and then measured against his co-workers who were given favorable assignments. Mr. Murphy's performance <u>was not</u> less than adequate; only that it was reported as such and believed by others. This inaccurate reporting is part of the circumstantial evidence of age and race bias. Next,

the placement on a performance improvement plan because of an overall performance evaluation of 'Does Not Meet' was not correct. The total overall performance did not correctly calculate to 'Does Not Meet' but instead calculated to 'Satisfies Most', which is above the level to be placed under a performance improvement plan. Finally, Mr. Murphy experienced age and race bias when he was terminated for allegedly not informing management, in a timely fashion, of a problem with a developing vanpool group. This assertion is not a factual accounting or supported by documentation.

The Petitioner asks the Court to look at this case because it has elements of injustice in an environment of frivolous lawsuits.

The District Court moved hastily to a decision without sufficient understanding of the Metro's vanpool procedures. The District Judge said: "...he lied about the existence of a vanpool. Metro fired him for this." "Murphy wishes away the paper record that he produced." (*pg. 3*) The District Judge is incorrect on both of these assertions. Mr. Murphy did not lie about the existence of a vanpool, and Mr. Murphy does not wish away his paper work submission because it was a correct submission. Mr. Murphy followed Metro's standard procedure, which he had followed on each of his van group paper work submissions over his two years of employment. The Metro supervisor, who was relatively new to his position, was mistaken about van paperwork procedures. The District Court Judge accepted the assertion of the Metro supervisor without verifying if he was correct by indicating: "It is irrelevant whether Metro's grounds for firing Murphy were erroneous as long as they were not transparent or false." (*pg. 3*) The Petitioner contends the grounds for termination were transparent and false. The Petitioner presented

document evidence that the grounds for termination were false, and circumstantial evidence that the reason for termination was transparent.
The main reason that the Metro upper management supported the supervisor's recommendation for termination was because they thought Mr. Murphy had not informed his supervisor about developmental problems with the vanpool group. When the Petitioner supported his claim of proper communication with physical evidence of e-mail proof, the Defendant responded that the supervisor 'had forgotten about the e-mail messages'. (*Pg.2, docket item #31*) The District Court Judge has allowed this type of assertion to continue without recognizing Metro's unfairness in this case.

The Court of Appeals considered with arguendo 'that Murphy did present a *prima facie* case', (*pg. 4*) however, they accepted the Defendant's reason for termination as valid, indicating Mr. Murphy's job performance as the back ground that lead to the termination. The Court of Appeals cited, incorrectly, that Mr. Murphy had 'problems with *his* job performance over the course of his two-year employment.' "Every performance evaluation and nearly every correspondence in the record indicated Murphy's deficiency." (*pg. 4*) The Court of Appeals has errored in this assertion because Mr. Murphy provided the document proof that he had four performance evaluations and all except the last one were 'Completely Satisfied' standards. The Appeals Court went on to say: "Murphy produced no corroborating evidence to support these allegations regarding the dissolution of the vanpool." (*pg. 6*) This statement is not correct because Mr. Murphy provided e-mail evidence that the vanpool group was still interested in forming as late as October 13, 2002, three day after the termination. The vanpool group

had not dissolved and it had been given permission to consider forming until Oct. 16th.

It is clear to the Petitioner that according to Rule 10: "A petition for writ of certiorari is rarely granted when the asserted error consist of erroneous factual findings or the misapplication of properly stated rule of law."

Even though both situations have occurred in this case, the basis of this appeal permeates to a larger issue. There is an issue of fairness in employment cases, in an environment of frivolous lawsuits, when the pendulum has swung too for outside the boundaries of reasonableness; and this case is an example of that. There was no investigation into the issues of this case at the EEOC level. The Petitioner believes the case was deprioritized when the EEOC's intake questionnaire asked if the applicant had previously filed an EEOC complaint. The Petitioner had gone through EEOC in 1986 against the Metropolitan Life Insurance Company. That case concluded with a Right To Sue Letter, which was continued to Federal Court with Judge Lynn Hughes rendering a decision against the Plaintiff. His decision was reversed upon appeal and returned to his Court where it settled out of court in 1989. In the current case, it was again before Judge Lynn Hughes and again Judge Hughes denied the complaint; and he was sustained upon appeal.

The Petitioner, Mr. Murphy, has not been able to secure employment in his field of expertise as an employment benefits manager since his lawsuit against the Metropolitan Life Insurance Company. Mr. Murphy feels that lawsuit was discovered by his Metro department managers and that information was used to dissuade other department managers as he sought a position in Metro's employee benefit department.

Since this current case was not investigated by EEOC for the issues of the complaint under which it was filed, a pattern of unfairness was established. If the stated reasons for termination are not true, and circumstantial evidence of age and race are asserted, then how does it follow that an EEOC case can sustain the position of the Defendant? What is the intransigent meaning of Equal Employment Opportunity if the level of proof of age and race issues is so high that no case can satisfy that level of proof?

When Mr. Murphy filed his current lawsuit he went to every attorney in the Houston area who was certified in employment law to request they take the case. All that responded indicated they would not take a discrimination case on retainer by contingency that was in Judge Lynn Hughes' court, no matter what the merits were.

Mr. Murphy has suffered the humiliation of termination for an issue he did not commit, under an implied accusation of ethical impropriety. Mr. Murphy has sought an investigation into this matter first internally within the company, then through the legal system. The legal system is broken when a case has as many errors as this case does and the level of proof necessary to sustain the complaint will not consider circumstantial evidence. Since this Court has already resolved that circumstantial evidence is appropriate in discrimination cases, the Petitioner asks the Supreme Court to reconsider this case for its Petition For Writ Of Certiorari to bring fairness back to Equal Employment Opportunity cases in the Fifth Circuit.

Respectfully submitted,

Jerry Murphy

Jerry Murphy, *Pro Se* Petitioner

May 16, 2005

Certification Pursuant to Rule 44.2

The Petitioner, Jerry Murphy, certifies that this petition for rehearing is presented in good faith and is not for the purpose of any delay. The contents of the petition for rehearing are limited to matters cognizable under Rule 44.2 of the Rules of the Court.

Jerry Murphy

Jerry Murphy, Petitioner, *Pro Se*